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JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887. No. 1002.

THOMAS J. MUSTIN, JOHN D. FORD, WILLIAM W. FOULKROD and WILLIAM SYCKELMORE, Junior, Trading as THOMAS J. MUSTIN & COMPANY,
Plaintiffs in Error,

against

JOHN CADWALADER, Collector of Customs for the District of Philadelphia.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

TREMAIN & TYLER,
ALEXANDER P. KETCHUM,
FRANK P. PRICHARD,
For Plaintiffs in Error.

Burgoyne Quick Printing Co., cor. Walker and Centre Sts.

Supreme Court of the United States.

THOMAS J. MUSTIN, JOHN D. FORD, WILLIAM W. FOULKROD, WILLIAM SYCKELMORE, Junior, trading as THOMAS J. MUSTIN & COMPANY,
Plaintiffs in Error,

AGAINST

JOHN CADWALADER, Collector of Customs,
Defendant in Error.

October Term, 1887.
No. 1002.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

Statement.

This action was brought by importers against the Collector of the Port of Philadelphia for an alleged excess of duty exacted upon an invoice of five packages of worsted yarns (see description of merchandise in report, at Rec., p. 13), primarily admitted to entry by the defendant on payment of duty at the rate of eighteen cents per pound and thirty-five per cent. *ad valorem*. The entry at this rate, as made by the importers, was grounded upon the statute fixing that rate for worsted yarns " valued at above forty cents per pound, and not exceeding sixty cents per pound."

The statute applicable assesses duty by the following language:

On worsted yarns "valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per pound and not exceeding forty cents per pound, twelve cents per pound; *valued at above forty cents per pound and not exceeding sixty cents per pound, eighteen cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound, twenty-four cents per pound; and in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem;* valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum *ad valorem*" (*22 Stat. L., 509*).

The appraiser reported to the Collector that the merchandise was valued at higher figures than as declared by the importer, namely, at figures which upon the invoice quantity averaged in excess of sixty cents per pound, and the Collector enlarged the duty to the rate of twenty-four cents per pound and thirty-five per cent. *ad valorem;* and in addition thereto exacted a further duty of twenty per cent. upon the total duty thus calculated, which was finally paid, under suitable protest.

The total duty in figures which the importer claimed to be correct was $611.42. The duty claimed and exacted by the Collector was $749.31; and the further sum of $208.20 as a penal or additional duty was imposed because the appraisers reported valuations exceeding by ten per cent. the valuations declared by the importer. For each of these two excesses (in all $346.09) over the true duty as claimed by the importer the action was brought (see Rec. folios 25, 26). Regarding the $208.20 exactions plaintiffs urged the inapplicability of R. S. Sec. 2900, under which section it was exacted.

The claims that were made by the plaintiffs upon the trial were in accordance with their seasonable protests and appeals duly made pursuant to the provisions of the statutes in that respect (U. S. R. S., Secs. 2931, 3011). See the statement in the Record to this effect at folio 26.

Some of the notices of dissatisfaction with the Collector's acts, in regard to the importation in question, were not received in evidence when so offered in the Court below. See plaintiffs' letter of August 30, 1886, at folio 34 ; offered the second time at folio 59.

One notice of dissatisfaction proven (fols. 27, 28) was made by plaintiffs according to form No. 102 set out in the Record at page 46, by which notice plaintiffs objected to the appraised value originally reported by the appraisers, on receipt of which notice a reappraisement was ordered by the government.

One " Chas. Henry Jones," a deputy collector " appointed " Wm. F. Read (fol. 29) a " merchant appraiser," with instructions " to appraise a lot of worsted yarns." No other person was appointed, and no other officer was instructed to act " in association " with him as the statute directed (Sec. 2930, R. S.).

The invoice came into the hands of Mr. Lewis Heyl, one of the four general appraisers commissioned by the President under R. S., Sec. 2608, who, on August 30th, 1886, in association with Mr. Read, was about to proceed to a hearing on said invoice. Learning this fact plaintiffs objected, and lodged their written objection as suggested by this " Board " with the defendant, the Collector (fols. 27, 34), claiming among other things that Mr. Read was not a proper person, and that he was not " familiar with the character and value of the goods in question " as required by the statute. This evidence was excluded (fols. 39–35).

This board, nevertheless, proceeded the next day and signed an appraisement set out in full at Record, p. 13. By this certificate the values were reported at the same figures as they had been reported by the preceding appraisement. Upon these figures, exceeding as they did the importers' invoice and entry-oath as above mentioned, the duties were estimated and exacted at the amounts above stated.

Proceeding as this "special tribunal" did, under Treasury regulations and instructions (set out in Record, pp. 42 to 64, and to which specific references are made in the following argument), the plaintiffs were without opportunity to know, much less to refute, allegations impugning their own sworn valuation, or to attend upon the actual inspection of the packages (either when samples were taken therefrom or at any other time) designated by the Collector, pursuant to the statute, to be opened, examined and inspected. This physical examination or essential inspection the plaintiffs claimed was not in fact performed. Mr. Read, when called by plaintiffs, so testified, stating that the board acted on samples only (Rec., p. 14). Subsequently, on the recall for the defense, he thought he had seen the goods with Mr. Heyl. If so, it must necessarily have been in plaintiff's absence (Art. 1410, fols. 113-118). *As to this actual examination by the witness Read there was a controversy of fact over his testimony* (fol. 61).

If, however, the reappraisers, or either of them did not in fact examine the original packages at all, in the opinion of the jury, there yet remained for the jury the controversy at the trial as to whether both members of the board saw *proper or sufficient* samples of the packages. They did see *some* samples (Rec., p. 14). *The goods were not all alike* (fol. 50). The identical samples were offered in evidence but excluded under exception (fol. 49). Evidence as to their discription, character and value was excluded (fols. 38, 39).

Plaintiffs were shut out from testing the defendant's evidence that there was "no perceptible difference" between the samples which the reappraisers did see; and from exhibiting the fairness or unfairness of such samples as representing the goods in the designated packages.

The Court permitted the jury to conclude that by seeing the samples that were seen the board did what was "equivalent" to examining the original packages although the latter might not actually have been inspected at all by either or by both members of the board as required by statute and by regulations.

Plaintiffs sought to have this error corrected by other instructions, which were refused; and exceptions were taken in detail to the exclusions, instructions and refusals (Rec., pp. 37, 38, 39, 40, 41).

Evidence as to the true value and character of the goods was excluded (fols. 33, 34, 35, 39).

Evidence as to the proceedings of the "special tribunal" of reappraisers was excluded (fol. 34).

Evidence as to the protests and objections of the plaintiffs to Mr. Read's acting in this case was excluded (fols. 34, 35, 39), including evidence to sustain the said protests or objections.

In fact the right was in every way refused the plaintiffs to show error, absence of merit or of jurisdiction, or a mistake of law, or error in the "ways and means" pursued by the reappraisers before certifying to their report, or whether in fact they did pursue "reasonable ways and means," and the jury were substantially instructed that *if the reappraisers did what* THEY DEEMED SUFFICIENT to enable them to determine the questions submitted to them, the plaintiffs were without redress (fols. 73, 78). In other words that the board was a law unto itself, and its fiat beyond the importers' question; that its constitution, methods of procedure, or absence of any procedure, could not be assailed [not being matters "for our consideration at all" (fol. 78)] and that its determinations could not in any wise be made a matter for judicial inquiry.

In all of these general regards, and in other incidental respects more or less subordinate thereto, the claims of plaintiffs were rejected by the Court below; and the trial thereby substantially limited to the issue as to whether in fact the reappraisers performed the *ceremony* of seeing *some* samples (fair or unfair), and of signing a certificate or report of appraisement.

That there was such a *ceremony* of course could not be disputed; and, after the exclusions of evidence and instructions, but one verdict was possible in the case as it was finally submitted.

Among other alleged erroneous instructions is the language of the Court, that because one of the plaintiffs showed the board *some samples* that was "in effect a declaration," an *admission* by plaintiffs that such samples were taken from the original packages. These packages had not then been delivered to the plaintiffs, but were in the appraiser's custody.

Of course whatever the plaintiff did state might be proven by defendant; but the plaintiff could not in his own behalf testify to his own statements or admissions. His necessary silence, therefore, strangely resulted in this instruction to the jury, that was specially excepted to (Record, p. 40).

Plaintiffs further claimed that no appraisement was "final and conclusive," because the only statute so declaring (R. S., Sec. 2930), was inoperative and void for unconstitutionality in its vital and inseverable feature directing collectors to appoint appraising officers. This power could not constitutionally be exercised under any statute vesting it elsewhere than in the president, courts of law or heads of departments. If this were not so, fugitive officers for a day, a week or a "season," might be appointed and removed by collectors, postmasters and other subordinates; and laws enacted whereby all the attributes of governmental authority and all the diversified functions of the Federal Administration might be distributed about the country with multifarious irresponsibilities. The "Civil Service" schemes would afford the only dubious restriction; and even the statute in that regard was not observed in the case at bar (fols. 40, 41). The statutory customs' service classification is set out in the record and an exception is founded upon its exclusion from testimony (fols. 41).

The particular questions arising out of the foregoing claims, as made by the plaintiffs upon the trial below, are specified in their proper relation in the following argument and statement of the exceptions assigned for error.

Assignments of Error.

1. The Court erred in excluding from evidence the "formal protest against the action of the person designated by the Collector to sit as a merchant appraiser in connection with the general appraiser," which protest was made in writing as soon as the plaintiffs or their representative knew who were proposing to act as appraisers (see exception at folios 27, 28, 34, 35, 39, 58, 59, Record, pages 11, 15, 17, 30, 31). This "formal protest" was made orally and in writing, the writing excluded being set forth at folio 34. The Court erred in declining to receive any testimony whatever as to what the plaintiffs or their representative did in this respect, and in declining to receive the plaintiffs' letter written to the defendant on August 30th, 1886.

2. The Court erred in rejecting proofs tending to show that the general appraiser and merchant appraiser convened on August 30th, and upon plaintiffs objecting that Mr. William F. Read should not act as merchant appraiser, on the ground that he was not a "discreet and experienced merchant familiar with the character and value of the goods in question," the proceedings of the board were adjourned, and that the same board reconvened on August 30th, and proceeded to conduct the appraisement against the importers' objections, and in the manner described at folios 32, 33, Record, page 14; and that the said board reached its results by act-

ing exclusively "on the samples and on the evidence submitted," not seeing the packages themselves (see folio 34 and the exceptions to the opinion at pp. 15–17).

3. The Court erred in refusing proofs that the merchant appraiser Read was not "familiar with the character and value" of such goods as were in controversy (see exceptions at folios 33, 35, 38, 39 and 77). (See briefs filed in Oelberman vs. Merritt, No. 47.)

4. The Court erred in refusing proofs touching the "character and value" of the goods (see same offer at folios 27, 33, and ruling excluding the same at folios 38 and 39).

5. The Court erred (see folio 35) in ruling that William F. Read had any authority to act as appraiser in the way he did act (see rulings at folios 35 and 39 upon the offers, and also similar rulings at folios 52, 64 to 66, 76, 77, 81).

6. The Court erred in excluding from proof the classification of civil service employees and the testimony that William F. Read was not appointed pursuant to the said classification or the statute under which it was made (see folios 40 and 41).

7. The Court erred in receiving evidence on behalf of the defendant as to who produced the samples before the merchant appraiser—the answer to the question propounded at the opening of defendant's testimony at folio 42, as per objection and exception stated.

8. The Court erred in receiving testimony under the question asked the merchant appraiser by the defendant's counsel (see the Record, page 18) as to whether the samples produced by the plaintiffs and those produced from the appraiser's office were of the same

character. The Court had excluded plaintiffs from this topic (fols. 33, 49, 39).

9. It was error for the Court, upon the cross-examination of the merchant appraiser Read, when produced as a witness on the part of defendant and after he had testified upon his examination in chief that he had seen certain samples which he supposed were of the goods in question, to exclude from the cross-examination the inquiry (Record p. 22) as to whether the witness at the time he saw the samples, as he supposed he did, was aware of the fact that the packages thus alleged to have been sampled were invoiced at different prices. The cross-examiner was shut out from this enquiry, which was very pertinent by way of testing the identity of the samples as representing various grades of goods.

10. It was error for the Court, in the same connection, to shut out any answer to the enquiry as to whether the witness Read could identify the goods he appraised (Record p. 22).

11. It was error for the Court, particularly in view of the purpose of the examination in chief, on the part of the defendant, of the witness William F. Read, and the cross-examination to which he had been subjected and the dispute of fact as to whether he as merchant appraiser saw either the packages themselves or samples of them, or had made "a full and fair examination" of the goods in question, to exclude from evidence and from the jury's inspection the identical samples that were before Mr. Read at the time of the alleged appraisement, which samples (see folio 49) were offered for the purpose of testing the testimony of the witness that they were fair samples of the goods he appraised. They would also illustrate the "character and value" which had already been ruled out. Moreover, these exhibits, as offered, were competent and essential evi-

dence in view of the direct testimony of Mr. Read that there was no perceptible difference between the samples (fols. 43, 49).

In this connection it should be stated that the defendant's witness Fisher, the United States Examiner, testified (folio 50) that the goods were not all alike ; and that the original invoice entry, as well as the final appraisement (Record pp. 13, 22, 24) papers in describing the goods, all show that the merchandise in the various packages was not identical.

12. It was error for the Court (fols. 52, 53) to refuse to hold that section 2930, U. S. R. S. was unconstitutional, and that the merchant appraiser who assumed to act had no lawful authority to act as appraiser, that his appointment was unlawful and void, first, because the collector had no right to appoint, and second, because the special deputy collector had no right to appoint. This error (see Record, p. 26) is not cured by the permission given the defendant to produce further testimony, and the defendant in availing himself of this permission did not produce any fortifying testimony as is hereinafter claimed.

13. The error for which the foregoing error is assigned is repeated in other forms under proper exceptions at folio 59, 35, 39 ; also, Record, pages 30, 32, 33, 36, subsequently in the refusal (fol. 59) to direct a verdict, and the charge of the Court as excepted to in the direction given to the jury that upon the testimony the " tribunal was lawfully constituted and had all the authority which the law gives to a tribunal for the imposition of duties " (see exceptions, Record, p. 39). Error in this respect is hereby assigned.

14. It was error for the Court to receive in evidence the testimony of the defendant, Cadwalader, concerning his pretended appointment of Mr. Read as merchant

appraiser, which testimony was received under two exceptions, stated at folios 53 and 54. It had already appeared in evidence that the appointment of Mr. Read as merchant appraiser was in writing, dated August 28, 1886, over the signature of "Charles Henry Jones, special deputy collector" (see Record, fol. 29), and the reception of parol testimony to explain, modify or contradict this appointment was error.

15. It was error for the Court to receive the testimony of the defendant in his own behalf tending to show conversations not in the presence of the plaintiffs or their agent, and to exhibit transactions in which plaintiffs had no part or concern, as is recorded on pages 26 and 27 of the record, and delivered for the purpose of fortifying in the defendant's behalf the unwarrantable appointment of Mr. Read.

16. It was error for the Court to have received in evidence against the plaintiffs the paper or written declaration of the defendant, Cadwalader, offered in evidence in his own behalf, and received under the plaintiff's objection and exception at folio 54. *Res inter alios acta.*

17. It was error for the Court to permit the defendant to testify on his examination in chief in his own behalf in answer to the following question propounded to him by his own counsel: "Q. Did you give Mr. Jones any instructions as to who was to be appointed?" such testimony being incompetent, immaterial and irrelevant, and the exception thereto well taken (see Record, page 27, folio 55). Under this exception a large amount of testimony was delivered, for which see record, pages 27, 28, 29. This testimony was specially obnoxious to the common law limitations upon collateral conversations occurring in the absence of the party to be affected. It also tended to show an appointment not made

by Charles Henry Jones, but made by word and not by deed of the defendant, Cadwalader, in a manner not authorized by the Treasury regulations, which formed the legal warrant and method of procedure for the defendant, and which regulations under the statutes required the appointment of the merchant appraiser to be in writing over the signature of the appointing officer, and in the form designated in article 467 of Treasury Regulations, set forth at folio 91, and followed in this case at folio 29. This form begins, "You are hereby appointed," etc.:

18. It was error for the Court not to permit plaintiff's counsel upon the cross-examination of defendant, when produced as a witness in his own behalf, to enquire as to whether the defendant had had any conversation with the merchant appraiser, Mr. Read, after being made aware that the importer had made objection to him. This enquiry was excluded and the exception thereto at Record, page 29, is assigned for error.

19. It was error for the Court to exclude, as it did exclude at folio 57, the defendant's testimony when under the plaintiff's cross-examination, as to whether the merchant appraiser's name is according to the usual course of business known to the importer prior to the time fixed for the hearing.

Plaintiffs had shown their expressed dissatisfaction against Mr. Read, had offered evidence (which had been excluded) that they protested against his appointment, and were entitled to prove that this was done promptly, and that under the usual course of business as soon as knowledge of the objectionable appointment was obtained. This and the preceding exclusion doubtless proceeded on the ground expressed in the Court's charge that (fol. 64, 77) the importer had no right to assail the appraiser's statutory qualifications, or to express or to prove the circumstances of any protest against the collector's "decision" appointing a merchant appraiser, notwithstanding Sec. 2931 expressly confers that right against any and every decision a collector may make. The exception to this exclusion is assigned for error.

20. It was error for the Court, after the case had been closed, and already once reopened and again closed, and while plaintiffs' counsel was again addressing the jury, to permit the evidence to be again reopened, and the witness Read to be recalled by the defendant. See folio 60, where the Court holds that as the witness was acting merely in an "*official capacity*" and apparently disinterested, the case might be reopened. This error is assigned upon the ground that judicial discretion has been so abused as to amount to error.

21. It was error for the Court to permit the witness, whose examination and memory had been exhausted, to be asked by the party calling him as to whether after he had left the stand he had gained "a more distinct recollection" on the topic he had testified about. (See exception, folio 61.) The fact that the examination of the particular packages in question by the witness was in dispute, as well as whether samples of those packages had actually been examined, rendered this proceeding onerous and prejudicial to the plaintiffs before the jury. This amounted to error.

22. It was error for the Court to charge the jury (see Record, page 32, and exception thereto at folio 76) that the appraisement "was to be made by the selection by the collector of one discreet and experienced merchant to be associated with one of the general appraisers whereever practicable, or two discreet and experienced merchants *and one general appraiser*. The duty to make the selection of what is called the merchant appraiser is thus confided to the collector."

This was obvious error in not stating section 2930 correctly—the statute not providing for a board of three members; also in the instruction that to the collector was confided the selection of the merchant appraiser. It was also error, because the appointment of the merchant appraiser in this case was not by the collector; and because the instruction permitted the jury to pass upon the question as to whether the collector did in fact in this case appoint a merchant appraiser, the warrant of whose appointment was signed by another officer (see folio 29); and because by this instruction the Court sought to enforce an unconstitutional statute.

23. It was also error for the Court to charge the jury as it did charge, in the following words:

> "The importer has no right to participate in this selection in any way; it is not required even that the collector shall give the importer notice; but upon notice or demand by the importer of a reappraisement the collector is to make the selection of an experienced person who, *in his sole judgment*, has the qualifications contemplated by the Act of Congress; and when he makes that selection, if he does it in good faith and honestly, his action is not open to question by anybody."

See the exceptions to this part of the charge at folio 77. The statutory qualification is an *essential fact.*

24. It was also errror for the Court to charge the jury as follows:

> "The importer has no right to go to him (the collector) afterwards and file a protest, saying, 'Why, this merchant appraiser is not satisfactory to me; he has not in my judgment, the qualifications which the law requires, and you ought, therefore, to dismiss him and substitute another person for him'; the law gives the importer no such right, but it is to the *honest judgment of the collector that the selection of a person who, with the*

general appraiser, is to constitute this tribunal, is committed."

This charge was error (see exception at folio 77).

25. It was also error for the Court to charge that there were but two questions in the case, namely: Was the tribunal properly constituted, and was its finding "so objectionable that the law will regard it as never having been made at all" (see exception in the record at the top of page 39). This charge directs the attention of the jury specially to the conclusions of the tribunal concerning whose proceedings testimony was excluded from the jury. It also compelled the jury to adopt as its own conclusions the conclusions of the members of the board who stated them on the witness stand without any opportunity on the part of the jury to hear in detail the actual proceedings or grounds of law or of fact upon which such conclusions were reached.

26. It was also error for the Court to charge, as it did charge at folio 65, that if the jury believed the testimony of Mr. Cadwalader, and the learned Judge discerned "no reason whatever why you should doubt it," the law was complied with so that the tribunal was properly constituted. "I do not deem it necessary to say anything as to whether the act of Mr. Jones would have been valid or not, because in view of Mr. Cadwalader's testimony, it does not seem to me to be a practical question in this case. I simply say that if you believe the testimony of Mr. Cadwalader, and I repeat that there is no reason why you should not believe it, this tribunal was lawfully constituted and had all the authority which the law gives to a tribunal for the imposition of duties."

(See the exception to these sentences in the charge on page 39.)

27. It was error for the Court to charge:

"Whatever errors may be alleged to have been committed by these appraisers in the course of discharging their duties, which are in the mere category of irregularities—although they may have operated harshly or unjustly, if you choose, upon this importer—is not a matter for our consideration at all" (see exception at folio 78).

This charge practically withdrew from the consideration of the jury any alleged irregularities in the procedures of the tribunal. It left such irregularities to be considered only by the Court ; and not even by the Court unless they were in its own judgment "of such a character as to make it imperative" upon the Court to disregard the judgment of the tribunal. That is to say, unless the Court so decided the questions of fact touching such alleged irregularities as to establish them in fact and in law as illegal proceedings, the jury need not consider them. This charge practically withdrew from the jury the questions of fact as to whether the appraisers saw the examination packages or actually saw any fair samples thereof, or in fact did anything except to sign an alleged appraisement. It substituted the conclusions upon these topics of the appraising tribunal and the judgment of its members as expressed upon the stand or in their certificate in the place of the independent judgment of the jurors as to whether the members of that tribunal were or were not guilty of "irregularities."

28. It was error for the Court to charge, as it did charge, at folio 68, to the effect that if the members of the appraising tribunal did not see the goods at all until after they had signed a report exhibiting their conclusions, it did not matter "whether the examination was made before or after the report was made out and signed by the appraisers" (see exception at top of page 40, folio 78).

This instruction did not permit the jury to take into consideration the important circumstance as to whether or not it was not true that the actual conclusion was reached and formulated by the appraisers before they went through the pretense or form (if they did in fact go through that form, which plaintiffs claimed was untrue) of a physical examination or inspection of the packages designated by the collector for that purpose. The circumstance itself was of grave importance as bearing upon not only the testimony of the members of the tribunal, but as to the truth of the irregularities as claimed by plaintiffs, of their failure to make such full and fair examination of the goods as is required by the statutes, regulations and the reasonable performance of official duty. Besides the circumstance was pregnant respecting the issue whether the Board did proceed by "reasonable ways and means" as prescribed by the statute.

29. It was error for the Court to charge as it did charge (folio 73) :

"Because you think they did not examine every portion of those three bales, it is not for you to say that their finding is void. All that the law requires is that they should fairly make such full examination as *they deem sufficient* to enable *them* to decide the question submitted for *their* determination" (see exception on page 40).

This charge practically submitted the conclusions of the appraisers and the *opinions* of the witnesses Heyl and Read in place of the conclusions of the jury upon their shifting testimony. This charge left no room for the jury to weigh doubtful testimony, or to exercise their own judgment upon any other question than the question as to whether these two witnesses were satisfied with themselves.

30. It was also error for the Court to charge, as it did charge, in effect, that because Mr. Mustin was at one time present before the appraising tribunal, having

some samples in his hands, that that was "in effect a declaration" of Mr. Mustin that he had brought the samples of the very packages that were to be examined (fol. 78).

This was error. There was no testimony that he brought samples from the invoice or packages in question. The evidence and regulations showed that the packages were not in his custody. He might have brought samples of other goods to illustrate, either of his own or of other people. The fact that he had samples with him did not excite any legal presumption whatever; much less was it "in effect a declaration by Mr. Mustin to the appraisers" of any kind whatever, either that they were the samples of his own goods or of any other kind (see remarks, *infra.*)

31. It was error for the Court to refuse to charge that for the validity of the appraisement the merchant appraiser and general appraiser "should examine at least one of the cases or packages of the goods of the invoice under consideration that were designated by the collector and sent to the public stores for examination for the purpose of the appraisement" (see folio 79). Neither this instruction nor its substance was anywhere given in the charge, and what was said upon the subject of the necessity to examine those packages was qualified by the alternative issue submitted in the charge as to whether samples were not examined to the *satisfaction of the appraisers* and as a substitute for the statutory examination of the packages themselves.

32. It was error for the Court to refuse to charge, as it did refuse (folio 79), that for the validity of the reappraisement it was necessary that the merchant appraiser as well as the general appraiser "should see and examine at least one of the original cases or packages from the invoice."

33. It was additional error for the Court in refusing to charge either of the last preceding propositions, to qualify either of them with the alternative, as submitted to the jury (see Record, page 41), that if the appraisers had before them samples taken from three of the packages designated, "and fairly and sufficiently showing the kind, quality and character of the goods," the Act of Congress was substantially complied with (see the special exceptions to this refusal and qualification at record, pages 41 and 40). Besides, the Court had excluded the samples themselves, without which their fairness and sufficiency were incapable of being tested.

34. It was error for the Court to refuse to charge, as it did refuse (folio 80), that the "examination of samples, even though they may have been fair samples, did not dispense with the necessity for an examination of the goods contained in at least one of the original cases or packages." Plaintiffs insisted that at least one of the original packages must itself be examined under the law, and that for this examination there could be no substitution or constructive examination by sample.

35. It was error for the Court to refuse to charge, as it did refuse, that if the jury concluded "that samples *only* were examined" they must find for the plaintiffs, on the ground that there was an irregularity in the appraisal and a non-compliance with the law (see folio 80).

36. It was error for the Court to refuse to charge the jury that if they believed plaintiffs were prevented from being present at the examination of their goods while it was being made by the reappraisers, that then the proceeding was unlawful and irregular (see folios 80 and 81). This error is not cured by the statement of the reason assigned by the Court for refusing to give that

instruction, viz., that there was no evidence that would warrant the jury in finding that the plaintiff was prevented from being present at any time or at any stage of the proceeding. There was some such evidence (Rec., p. 21), and such was the course of business apparent from the regulations and instructions under which concededly the appraisers were acting, and which being also in evidence are set out in full in the record, pages 48 to 66. Also Article 1410, folios 114–118. Mr. Read testified that he did " not know of any means that Mr. Mustin had of being present " (p. 21).

37. It was error for the Court in refusing to charge as requested in the foregoing assignment, to add the further and unjustifiable instruction that it was no part of the duty of the appraisers to notify the plaintiffs what they were going to do, and ask him to be present (see the exception to this instruction to the jury at folio 81).

The points of error presented by assignments of error 29, 30, 31, 32, 33, 34 and 35, were specially brought to the notice of the Court, both before the charge and after the charge, and special exceptions taken and allowed (see page 37 and also pages 40 and 41).

Brief and Argument.

I.

An Appraiser is an officer. He can only be appointed by the President, or, if an "inferior officer," by the Head of a Department or a Court of Law.

1. The term "officers," as used in the United States Constitution (Art. II., Sec. 2) and Statutes, has a well defined legal signification.

Apart from this signification as expressed in the Revised Statutes, and as judicially declared in numerous classes of cases which have arisen wherever the common law is in vogue, the ordinary signification of the term "office" is clear and unambiguous. Its popular and legal significations are the same.

It is common speech to say: "Public office is a public trust." Webster defines office to be "a particular duty, charge, or trust, conferred by public authority, and for a public purpose." An "officer" is the incumbent of an office. The official or unofficial character of a position is to be determined not by the presence or absence of an official designation or of a long term of service; but by the nature of its functions. Nor is the question or amount of pay or emolument a necessary feature of an office. Members of Parliament did not receive pay. General Washington served without emolument. Both popularly, technically and legally were officers. The right to emolument is an incident that might characterize an office, yet it is not essential. "In my opinion," said Best, Ch. J., in Henley v. Mayor of Lyme, 5 Bing., 91, "every one who is appointed to discharge a public duty and receives compensation for the same in whatever shape, whether from the Crown or otherwise, is a public officer."

"Every man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits; because it is the duty of the *office* and the *nature* of the duty which makes him a public officer and not the extent of his authority" (*State vs. Wilson, 29 Ohio St., 348*).

"The terms 'office and public trust' have no legal or technical meaning distinct from their ordinary signification. An office is a public charge or employment in which the public are interested" (Chancellor, *In re Wood, Hopk., 6*).

An office is "a right which entitles a man to act in the affairs of others without their appointment or permission." (See Mozley & Whiteley's Law Dic., p. 284.) It is "a duty, a charge, a trust, exercised for a public purpose" (32 N. Y., 726). It is "a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private."

The term office "refers to the functions to be performed" (Stone vs. U. S., 3 Court Cl., 262).

It is "*that function by virtue whereof a person has some employment in the affairs of another* (Wharton); and it may be public or private or *quasi* public as exercised under public authority, but yet affect only the affairs of particular individuals." (71 N. Y., 243).

"The word *officium* principally implies a duty and in the next place the charge of such duty; and it is a rule that *where one man hath to do with another man's affairs against his will and without his leave, that is an office and he who is in it is an officer.*" (Carthew's Rep., 478-9).

Offices "consist in a right and corresponding duty to exercise a public or private trust and to take the emoluments belonging to it." (*3 Kent Com., 454*).

"An office is defined to be," said Ch. J. Marshal (1823) in *U. S. vs. Maurice, 2 Brock, 102*, "'a public charge or employment,' and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States" * * * unless it be a mere employment contract. "But if a duty be a continuing one, which is defined by rules prescribed by the Government and not by contract, *which an individual is appointed by Government to perform, who enters on the duties appertaining to his station without any contract defining them, if these duties continue though the person be changed*, it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer." In that case the army regulations had provided for the appointment and had defined the duties of agents of fortifications. The were governed by the Engineer Department, and were directed to do certain things. These offices were established, in the first instance, only by army regulations, although they were necessarily recognized in subsequent legislation approving and adopting such regulations. "A very superficial examination of the laws," says Marshal, "will be sufficient to show that duties of this description, *if not performed by contract*, are performed by persons who are considered as officers of the United States, whose offices are established by law." So the *office* of agent of fortifications was held to exist. In the case at bar there can be no such question as the existence of the office. It is in terms created by the Act of Congress. It is an office having a name with prescribed qualifications for its incumbent, precise duties defined and limited by statute, extensive powers affecting the rights of the sovereign and the liabilities of the subject, and having official jurisdiction, authority and action, which is exclusively measured by legislative enactments. The rights, duties and powers of the office rest and continue to each several or successive appointee on his taking the oath of office. This oath marks the measure of his duty and denotes the absence of any contract relation concerning it.

"Those who perform duties under contracts are not regarded as officers, but *those who act under law prescribing and regulating their duties concerning even a portion of the public seem to be considered officers.*" (7 Bacon, 279–280).

When the Legislature imposes on the executive department specific duties, and directs peremptorily the performance by the executive of certain acts, when the rights of individuals, as well as of the Government, depend on the performance of those acts, he, the executive officer, is the officer of the law and is amenable to the law. (*See Sergt. on Constn., Ch. 31*).

In pursuing his functions and reaching his official conclusions the officer, in the case at bar, is governed exclusively by the acts of Congress. He is no clerk, agent or representative of any person or of any other officer. He is subordinate in his determinations to no other officer. His judgments are "final." In his own person and official doings he represents that portion of the sovereign power delegated to his office by the authority that established it. His office is his chart. He is not a contractor. He sells nothing. He produces nothing. He only serves the public as prescribed by the public laws by which alone he is controlled.

It has been said that a "manifest difference exists between an *office* and an *employment* under the government. We apprehend that the term "office" implies a delegation of some portion of the sovereign power to and possession of it by the person filling the office, and the exercise of such power within the legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the great departments of government, legislative, judicial or executive or sometimes to another. Still it is a legal power which may be rightfully exercised, and in its efforts it will bind the rights of others and be subject to revision and correction only according to the standing laws of the State. An *employment* merely has none of these distinguishing features." * * * "It appears then that EVERY OFFICE in the constitutional meaning of the term implies AN AUTHORITY TO EXERCISE SOME PORTION OF THE SOVEREIGN POWER either in making, executing or administering laws."

If the conclusions of these appraisers are in no wise contestible they may practically make, construe and administer the laws, as well as impose individual taxation beyond the point of confiscation. The power to impose a tax, a penalty, and to measure the *quantum* of both through this appointee's signature is an exercise of the highest attribute of sovereignty, next to the power over life. What "officer" of the Republic exerts a higher prerogative? To whom or to what are they "inferior?"

2. Although every office is an employment, yet there are many employments which do not come under the denomination of offices, being ordinary engagements or contracts, *e. g.*, to make hay, to plough parks, to light a building, to furnish supplies, to construct vessels or implements of war, to carry the mails, under executive supervision. Yet Congress may create offices charged with any of these duties and apportion the ministerial machinery for the purpose. The *offices* may endure for the season, the day, or exclusively for "the job." They would be none the less offices, and their incumbents "officers" governed by law and established regulations. They would be a part of the Civil Service of the United States, and owe their selection to constitutional authority. Congress could not select them, or authorize their selection except as provided by the Constitution.

There is no appointing power, it must be conceded, except as the Constitution provides for it; and that is the equivalent of stating that the incumbents of any offices created by Congress shall not be otherwise selected than by the President, Heads of Departments and Courts of Law.

The constitutional power of Congress to levy taxes means that duties shall be levied pursuant to law, by officers amenable only to law, and deriving their authority exclusively from stipulated constitutional sources. The acts of all officials in the taxation machinery of the Government must necesarily be purely ministerial, else the autonomy of the judicial and legislative departments would not be preserved against the intrusions of the executive. The validity of these ministerial acts must be decided by the legal principles which govern all acts of this character; and the principles are to be determined by the judiciary.

These principles require that the organic law, the statutes and the executive performances shall always harmonize and exactly coincide.

This would not be possible under a taxing scheme which was the totality of petty contracts, bargainings of employes, wanton acts of agents, of sub-agents and general irresponsible official determinations touching the amount of duties; instead of a careful system of laws and uniform regulations by which every act in the machinery for revenue is officially measured and subjected to judicial scrutiny. It is impossible to place any legal factor in this system beyond the well-established line of *offices.*

Every distinctive performance in operating the machinery established for the customs revenue is necessarily the act of some officer of the Civil Service.

So authoratively is this principle recognized that there is no employee, however humble, in the whole range of Custom House operations (even to the day laborers in the public stores) whose appointment is not recorded over the signature or approval of the Secretary of the Treasury.

3. As to whether these special appointees of the Collector to appraise are *principal* officers or "*inferior* officers" with regard to that distinctive constitutional term need not in this case be determined. It is sufficient that they are "officers" in the *Civil* Service, as distinguished from the military and naval service of the United States.

If "inferior," to whom or to what are they subordinate? In their conclusions, to none. Over their judgments even the "Head of the Department" has no voice.

As between the three sources of constitutional appointment some occasions have arisen to consider this section.

In Collins case, 14 Court of Claims, 574, referring to this section of the Constitution, it was said:

> "It would be impossible to defne exactly and arbitrarily the meaning of the words 'inferior officers' in their application of officers of the different branches of the public service who have no official relation to each other; and it would not be easy to separate all the officers of the Government into two classes and draw a satisfactory line which would divide the inferior, in the sense in which it is claimed that word is used, from these of the higher class, nor is it necessary to attempt to do either. In our opinion, the words, as used in connection with the other language of the same clause, have a plain, definite and intelligible meaning capable of unmistakable application to effect the purposes of that provision of the Constitution. Having specified certain officers, ministers, consuls and judges of the Supreme Court who shall be nominated by the President and appointed by and with the advice and consent of the Senate in all cases, the Constitution leaves it to Congress to vest in the President alone the courts of law or heads of departments the appointment of any officer inferior or subordinate to them respectively, whenever Congress thinks proper to do so. Thus, it may authorize the President or the head of the War Department to appoint an army officer, because the officer to be appointed is inferior to the one thus vested with appointing power (?). The word inferior is not here used in that vague, indefinite and quite inaccurate sense which has been suggested—the sense of petty or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointing may be vested—the President, the Courts of Law and the heads of departments. It is a word having definite relations to a superior; 'subordinate,' 'lower

Act of Congress in March, 1865, Internal Revenue assistant assessors were to be appointed by assessors; and the act repealed so much of the Act of 1864 as conferred on the Secretary of Treasury the power of appointment, with the approval of the Commissioner of Internal Revenue, of assistant assessors.

"The law, therefore, established an office without designating any competent public authority as authorized to appoint the officer."

In rendering his opinion the Attorney-General says:

> "The legal character of the place is, therefore, the first point for determination." He asks: What is the nature of his (assistant assessor's) duties? "One point of inquiry would be whether they are the duties of another which he performs in right of and by deputation from that other? They are not of that character. The statute carefully prescribes the sphere of his authority, but within that sphere he performs the duties and exercises the powers devolving upon him in subordination and *under responsibility only to the law, whose agent in truth he is.* The assessor may re-examine and rectify his assessments (no one can re-examine or rectify the merchant appraiser's assessments), but only as a Court of Error may revise and correct the decisions of inferior tribunals on appeal. I have no difficulty, then, in determining that an assistant assessor is an 'officer' in the meaning of the Constitution. The tests that I have applied in ascertaining the legal character of his employment were adopted with like result in the case of inspectors of the customs under the Acts of 1799 and 1815 by my predecessors Mr. Wirt, Mr. Berrien and Mr. Legare. All of these distinguished gentlemen were of opinion that the *inspectors* contemplated by these statutes were to all intents and purposes *officers* of the United States and *not* the *deputies'* employees or agents *of* the *collectors*." So that if the Act of 1799 contemplated appointment of occasional inspectors by collectors, it was held by Mr. Legare, Attorney-General, to be null and void, and capable only of being constitutionally upheld on the construction that the statute contemplated the Secretary of the Treasury as the appointing power.

4. "The constitutional provisions must be construed as excluding all other modes of appointment."

In 13 Opinion Atty. Genl., 518 (A. T. Akerman), it is well said:

> "If appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the

person or body in whom the appointing power is vested by the Constitution, and a mode of selection which gives no room for the exercise of that will is inadmissible. * * * Viewing the appointing power conferred in the Constitution as a substantial and not merely a nominal function, I cannot but believe that the judgment and will of the constitutional depositary of that power should be exercised in *every appointment*. The power was lodged where it is because the makers of the Constitution, after careful consideration, thought that in no other depositaries of it could the judgment and will to make proper appointments so certainly be found. They assigned it to functionaries who were expected to have an adequate knowledge of men and of affairs, to have capacity for public business, and to feel responsible to conscience and to the opinion of good citizens. As a further security, they placed the power in the hands of those who would have a particular interest in using it well. If a legislative body is ill officered, the members cannot do their work with ease or advantage; therefore, each branch of Congress chooses its officers. Without efficient servitors a court of law is impotent; therefore, Congress may vest appointments in the courts. The first need of the head of a department is a body of capable and trusty assistants; therefore, Congress may vest appointments in the heads of departments. In all cases not thus provided for the appointment is with the President, where success in his weighty charge essentially depends on the competency of appointees. Thus *the reasons for the constitutional provision all forbid that any judgment and will but those of the constitutional appointing power should have legal operation in the matter of appointment*. * * * The argument has been made that the unquestioned right of Congress to create offices implies a right to prescribe qualifications for them. This is admitted" (*e. g.*, that an appointee is to be a "discreet and experienced merchant"). "But this right to prescribe qualifications is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. The parts of the Constitution which confer this power are as valid as those parts from which Congress derives the power to create offices, and one part should not be sacrificed to the other. *An office cannot be created except under the conditions that it shall be filled according to the constitutional rule.* The legislation of the country from an early period has been supposed to authorize a different constitutional view from that which is herein expressed. * * * But when a congressional construction is inconsistent with the plain meaning of the Constitution as ascertained by authoritative canons, that meaning cannot be overruled by such construction, how often soever repeated. Congress has at various times authorized appointments independently of the President, courts of law or heads of departments, in departmental bureaus, in the customs service, in the land offices and in some other branches of the civil service. Upon this legislation it may be observed: First, that in some cases, such as those of deputy marshals and deputy clerks, the persons appointed are *representatives of the officers who appoint them* and who in some particulars are responsible for their conduct, and perhaps it was considered by Congress that the office was substantially in the principal" (not so with merchant appraisers). "Second, that it was no doubt considered by Congress that some of the persons whose appointments were thus provided for were not officers in the constitutional sense of the term. *Many employments now universally held to be offices were not esteemed such at the outset, but with the growth of the Government were raised to that rank.* Thus the force of legislative precedents is somewhat weakened. Yet it cannot be denied that some of them take for granted that Congress is absolute in the matter of appointments. *Such, however, is not the constitutional rule.* Congress has power to distribute at its pleasure the appointment of inferior offices between the President, courts of law and heads of departments, or to vest such appointments exclusively in one or two depositories; but it has no power to vest appointments elsewhere, directly or indirectly. * * * It more concerns us to ascertain what is the constitutional rule than to learn whether that rule has always been observed. Nineteen violations of the Constitution do not justify a twentieth."

In *4 Op., Atty. Gen'l., 164*, H. S. LEGARE, Atty.-Gen'l., said:

"Congress had no power to vest the appointment of any employee coming fairly within the designation of an inferior officer of the Government in any other public authority but the President, the heads of departments or the judicial tribunals, and therefore the collector could not appoint *occasional* inspectors. The opinions of my predecessors concur in establishing that *occasional inspectors* as well as permanent inspectors are to all intents and purposes *officers* of the United States, not mere occasional deputies, employees or agents of the collector. The individual's name is to be submitted to and approved by the Secretary of Treasury."

In the earliest revenue act (1799) there was a provision for a *per diem* compensation (U. S. R. S., Sec. 2733) to persons employed by the collector in aid of the customs; but such persons were employed under the special approval of the Secretary of the Treasury, who, by later acts (*e. g.*, Laws 1822, Ch. 107), should "from time to time limit and fix the number and compensation of the clerks to be employed by any collector," etc. In construing such an act it seemed to be conceded that those so employed were officers (see U. S. vs. Morse, 3 Story, 90). The necessity of appointing all customs employees by the head of the Treasury Department, when not appointed by the president, has always been recognized, and during recent years has been punctiliously practiced. In 1817 persons employed by the collector were by statute declared to be officers of the customs (3 Stat. at L., 397, Sec. 7).

That a deputy or agent—a mere employee without authority in his own name or certification, but only in the name of another, and acting exclusively as representing his superior officer—should be regarded as an "officer," while the sworn members of a tribunal established by law, pursuing a statutory procedure, with powers to take testimony and to establish debts, and reaching independent and incontestible certifications and judgments, should *not* be regarded as officers, is a proposition that refutes itself.

5. This tribunal is composed of appointees whose duties prescribed by law are to be performed by them alone, and not in right of or by deputation from another.

The merchant appraiser is *not* the representative of the Collector. The Collector has no right to appraise. Merchant appraisers are the appraisers ; he is a valuation officer. The Collector has no power to exact *ad valorem* duties when the importer is dissatisfied, except by virtue of the official values and signatures of the reappraisers. The Secretary himself could not direct him to take lower or different values ; nor remove the Collector's appointees. They are *above* any officer whatever in their office, and their office extends to as many cases as the Collector may send them. He may send to the same pair of appointees all the cases of one day, one week, one month, or one year. He may send all the importations of one house uniformly to a pair of its competitors. Such a discretion is beyond the limits of constitutional possibility.

In a common law sense such an office is higher and in no wise " inferior " to the " head of a department," or even a " Court of law ; " and its incumbent, it might almost seem, should be fortified by the Constitutional warrant even of an appointment by the President, confirmed by the Senate.

In *8 Opin. Atty.-Genl. 41*, it was said by Mr. Cushing that the power of appointment could not be communicated by Act of Congress to persons not named to that end in the Constitution. The case was where an Act of Congress had authorized the President to appoint a Commissioner to whom, together with another Commissioner *to be appointed by the Mayor of* Baltimore, he should refer the question of a selection of a post-office site ; and if said Commissioners should disagree they should choose a third, and if the President approve their decision his approval should be final, and if not he should refer it to Congress. Is the thing which the President is authorized to do legally a thing which is possible to be done ? * * * That thing " is *the appointment of three agents* through whom the President is *to investigate and determine the elements of an executive act to be performed.* Now how is the President to exercise this appointing power in copartnership with the Mayor of Baltimore ?" How can Congress bestow any part of the appointing power on the Mayor of Baltimore ? If this were a mandatory condition it could not be executed by the President.

Now Sec. 2930, U. S. R. S., is mandatory on the Collector. *He* is obliged under the statute to appoint a " tribunal," upon whose certification " duties shall be levied accordingly." The Constitution will not permit any United States tribunal to be created in that way. The Collector is not at liberty to send the case for further proceedings before some constitutional tribunal ; but he must " select one discreet and experienced merchant, to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and *appraise* the same agreeably to the foregoing provisions ; and if they shall disagree the Collector shall decide between them ; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly."

6. It will be observed that even with respect to the General Appraiser, as the possible half of the tribunal to be appointed by the Collector, that officer has no power by any Act of Congress to certify to an appraisement. He is not appointed by the President for that purpose. He is appointed as an assistant of the Secretary "to "protect and insure uniformity in the collection of "revenue" (Sec. 2608), without power, except by direction of the Secretary, in visiting special ports to "ASSIST" the regular appraisers, among whom are these "discreet and experienced merchants." The whole scheme of confidence in the Collector as to these appointments is constitutionally vicious, and is not cured because one of these four general visiting officers may, perchance, be designated by the Collector as a possible half of a "tribunal" otherwise certainly unconstitutionally created. Both members of this tribunal may be the exclusive appointees of the Collector.

In the case at bar the Collector followed the Government practice and omitted to appoint any General Appraiser or any associate whatever to act with Mr. Read ; so that the tribunal was not even constituted according to the statute.

7. In 34 N. Y., 398, the foregoing description of what constitutes an office was applied to Commissioners to lay out a road, who were said to be officers. Commis-

sioners appointed by the Governor, to superintend the the construction of a building, are officers under Sec. 16, Art. 4, N. Y. Constitution, which provides that where the duration of an office is not prescribed by the Constitution it may be declared by law, and when not so declared shall be during the pleasure of the appointing power (citing 20 Wend., 595). So a collector of a village tax, appointed by village trustees, was held to be a public officer because he was entrusted with a public duty. "*It is the charge or duty of the position, and not the mode of appointment that determines whether the position is an office or a simple employment*" *(34 N. Y., 399)*.

The performance of a single function of a public character by an individual acting by virtue of a statute and under public authority has been held to constitute an office and its incumbent an officer within the purview of United States law. In two circuits it has been held that the duties of receivers of national banks "not being defined by any contract but by law and rule prescribed by the government, those receivers are *officers* of the government which appoints them."

Incidentally in so holding it was noticed that they were appointed by the Comptroller of the Currency acting under special approval of the Secretary of the Treasury, else, being public officers their appointments might be objectionable as not coming from the head of a department. That the statutes respecting these receivers could only be upheld by such a construction as harmonized the appointing power with the constitutional requirement ("head of department"), lends additional weight to the expressions at circuit in the two cases of Platt vs. Beach, 2 Ben., 316, and Price vs. Abbott, 17 Fed. Rep.. 507, as judicial expositions of the term "*officer*."

In *Wise vs. Withers, 2 Cr., 336*, MARSHAL, Ch. J., in declaring a justice of the peace who had powers partly executive and partly judicial—an officer of the United

States—said: "A distinction has been attempted between an officer of the United States and an officer of the Government of the United States, confining the latter more especially to officers who are considered as belonging to the high departments, but in this distinction there does not appear to the Court to be a solid difference."

Even a sail-maker at the Washington Navy Yard in 1813 appointed only by the Secretary of the Navy, in a case where the President only was authorized to appoint, was held to be an officer of the United States, in Sanford vs. Boyd, 2 Cr. C. C., 78; and a clerk in the Treasury Department was held to be "an executive officer of the United States" in *Ex parte Smith, Ibid., 694.*

II.

THE TRIBUNAL ORGANIZED UNDER SECTION 2930, U. S. REVISED STATUTES, IS AN OFFICIAL BOARD. BOTH MEMBERS OF THIS TRIBUNAL ARE UNITED STATES OFFICERS. *They act for and on behalf and under the constituted authorities of the United States.* This is true in fact and in law, by statute and under the Treasury Regulations as well as according to the uniform practice.

The duties of the tribunal, the power, jurisdiction and authority of its members, individually and collectively, are fixed by law. Their official conculsions are of superior dignity; and, however carelessly or in disregard of law they may be arrived at, when once established they are declared to be the results of "due process of law."

Their determinations are, to the collector, "final and conclusive," and by these determinations, according to section 2930, duties are to be levied, which levy, under

Sec. 21, Ch. 193, "Anti-Moiety" Act of June 22, 1874, in the absence of fraud and of protest is "final and conclusive upon all parties." Even when protested against, certain alleged errors of their proceedings, as for instance, whether they ascertained the wholesale or retail value, or the value in the markets described in thestatutes or insome other markets, or whether they considered improper statements, or whether they heard any evidence at all, or in fact had any knowledge or information of any sort whatever touching the thing they have certified to, have been held to be free from extraneous inspection. Their conclusions, if not their wisdom, have been held to be inscrutible. Authorized only to record opinions resulting from a complicated set of statutes, and supposed to be clothed with statutory power to base those opinions on legal evidence, they may nevertheless take illegal evidence, and base their opinions upon mistakes of law or upon unworthy motives, and escape official review and judicial scrutiny. So potential an office was never found in the domain of English common law. Some circuit judges have gone so far as to decide that even if this tribunal be of known bias and unfitness, selected, it may be merely to register the wishes of persons or of officers interested in controlling the organization and conclusions of the tribunal, the citizen, the judiciary, the stranger who comes to our shores with his merchandise to enjoy our equality and liberty, is nevertheless without redress.

Such is the practical operation of the law, and the solemn dignity of this unparalleled "tribunal." If Congress had designed any such results it would not have struggled as it has struggled by successive enactments to describe the specific duties of these appraisers, to define what they shall see, whom they may summon, what peculiar facts they shall ascertain, and what items of valuation may and what may not be taken into consideration.

Inventors when erroneously refused patents, may have certain errors reviewed, ministerially and judicially The right of settlers under the homestead laws depend on the laws as applied to the facts of their case, not upon the capricious judgments of land-office employees. Shall it be said that there is no way to scrutinize the integrity of a United States tax because the collector is shielded by the certificates of his own appointees?

If this shall be the judicial exposition of existing statutes, then the infraction of the Constitution by those statutes is irremediable, and the wisdom of restricting the appointing power to the great offices mentioned in the Constitution is obvious.

By the STATUTES *and by* TREASURY REGULATIONS, *considered either together or separately*, MERCHANT APPRAISERS ARE OFFICERS.

They are incumbents of an office. They are Government appointees (Art. 1415–473), to be governed by the Treasury regulations (Art. 1416, Record, fol. 115, 76–77, 93–94). Their certificate is "*the appraisement*" (*Ib.*, fol. 100, Art. 485; and U. S. R. S., Sec 2950), with which "neither the President nor any head of a department, nor the courts of law can interfere so long as the *forms of law* are followed" (fol. 125), although the law itself may have been flagrantly violated.

Examine their statutory functions.

"All resident merchants appointed according to law to act as appraisers shall severally take and subscribe an oath, diligently and faithfully, to examine and inspect such merchandise as the collector may direct, and truly to report to the best of their knowledge and belief the true value thereof (U. S. R. S., Sec. 2614); which is substantially the oath prescribed for the appraiser for the Port of New York.

Being appointed under Title 34, he "shall before entering on his duties take and subscribe an oath," etc.

(Secs. 2616 and 1756). The "oath required to be taken by any person appointed to office under this title shall be taken before the collector of the district" (Sec. 2617), which specific provision is to prevail over general provisions applicable in cases of "disability," (Sec. 2625), "occasional and necessary absence or sickness." (Secs. 2630, 2631).

In the present case the oath was administered by a deputy collector, which was irregular, like the appointment itself.

Congress has itself defined the term "officer." An "officer" under the statutes is, of course, the "officer" mentioned in Sec. 2, Art. II., of the Constitution.

In the statutes "the reference to any *officer* shall include *any person authorized by law to perform the duties of such office*" (U. S. R. S., Sec. 1).

These appointees are so-called "merchants" appointed according to law to act as appraisers. They act "for or on behalf of the United States, in an official capacity under or by virtue of the authority of a department or office of the government," and are amenable to the statutes against bribery (Secs. 5501 and 5451). They have power (*i. e.*, if *any executive* officer may constitutionally wield such power) "to call before them and examine upon oath any owner, importer or consignee, *or other person*, touching any matter or thing which *they* may deem material in ascertaining the true market value or wholesale price of *any* merchandise imported," and may require the production of papers, etc. (Sec. 2922); and may require witnesses to attend and testify (Sec. 2923); and it is declared perjury to testify falsely before appraisers (Secs. 5392, 2924).

Surely, so potential an officer should receive commission from the President, as appraisers and assistant appraisers are appointed (Secs. 2536, 2608).

Among the duties of these resident appraisers may be mentioned (Sec. 2652) to follow lawful instructions of the Secretary of the Treasury, and in case of difficulty "as to the true construction or meaning of any part of the revenue laws" to obey implicitly that officer's decision.

"It shall be the duty of the appraisers of the United States and every of them and every *person who shall act as such appraiser*" * * * "by all reasonable ways and means in his or their power * * * to appraise "the true and actual market value and wholesale price in the principal markets of the country from whence exported," etc., "Secs. 2902 and 2952."

This must be done, however, by the statutory methods described in U. S. R. S., Secs. 2904, 2905, 2906, 2907, 2910, 2911, 2912, 2913, 2916, 2919, 2921, 2922, 2923, 2927.

These provisions require that *ad valorem* duty shall be levied upon the above-described market "value on the day of actual shipment," as shown by a certified bill of laden* when presented (Sec. 2904); and upon merchandise imported from a country in which it has not been manufactured upon the price of similar articles in the country of manufacture at the period of exportation to the United States (Sec.2905); and when duty is imposed according to the value of a specified quantity or parcel, the appraisement must be at the wholesale price in the principal markets of the country from which the same has been imported (Sec. 2906); and in determining such values the cost of transportation, packing and certain charges were formerly added (Sec. 2907), while now they are no longer added, but should not be included (Tariff Act, 1883); and when there is expressed an average price in an invoice the duty shall be assessed upon the whole invoice according to its highest item (Sec. 2910); and the best article in wool cases fixes the value

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*This Bill of Lading is not permitted to be seen by the appraisers, but is attached to the entry, and importer's oath, which in practice is withheld from the appraisers' inspection!

(Sec. 2911); and the wool of best quality carries up the duty of its fellow-wool (Sec. 2912); and no discrimination as to trade-marks shall be made between kid gloves (Sec. 2913). Standards of weights for bushels of various grains are established, by which appraisers must be governed (Sec. 2919), and the right given to summon owners and others and their books and papers to testify touching dutiable value (Sec. 2022); under penalties and "conclusive" appraisements for refusal (Secs. 2923, 2924).

The damage also to imported goods is to be ascertained according to prescribed methods (Sec. 2927).

Should any of these provisions, applicable in any given case, not be pursued, by so much is the procedure illegal.

Congress did not intend that these careful provisions should be rendered nugatory by the will of any official. On the contrary, the conformity or non-conformity to the Congressional standards in any given case is the exclusive measure of the legality of procedure and result applicable to that particular case. If this were not so the direction to appraise "agreeably to the foregoing provisions" would be nugatory; for whether acting originally at ports where there are no other appraisers, or as members of the appraisal tribunal on appeals from damage or other appraisements the appraisement must be "agreeably to the foregoing provisions" (Sec. 2930). Among these provisions is to proceed by all *reasonable* ways and means. Shall not the judiciary scrutinize the method, decide what is "reasonable" and submit the reasonableness of the procedure on reappraisement in any particular case to a jury?

It being protested that "reasonable ways and means" were not pursued, that issue is triable. Hence the Courts should examine the proceedings under unreasonable general instructions from the Secretary of Treasury and test the extent of his official coercion upon the appraisements.

The statute specially enjoins these merchant appraisers that "the mode hereinbefore prescribed of ascertaining the foreign value" * * * "shall be carefully observed by the revenue officers to whom is committed the estimating and collection of duties."

The "two respectable resident merchants who shall be the appraisers of such merchandise," appointed by the Collector, under Sec. 2609, at ports where there are no other appraisers correspond in functions and duties with the "discreet and experienced" appointees of the Collector under Sec. 2930; the conclusions of the latter are "final" and "duties shall be levied accordingly," as indeed they would be levied in the other case except in event of an appeal. The same statutes direct the procedures and purposes.

The "discreet and experienced merchants," under sec. 2930, are *the* appraisers (irrevocably) of the importations regularly before them; and of as many more importations as the Collector may choose to send to them out of the "dissatisfied" appraisements occurring during his term of office.

The official character of these merchant appraisers in the performance of the public duty assigned to them corresponds in all respects with that of the appraiser of the port. The certificate of *one* appraiser is of no higher dignity than the certificate of any other other one appraiser in respect to an importation regularly before him. Nor does it help the merchant appraiser's warrant that he *may*, under Sec. 2930, act in "association" with an officer commissioned by the President.

Congress cannot constitutionally create a tribunal, one member of which shall be named by the President and one member appointed by the Mayor of Baltimore. Such a statute would be vicious and inoperative. So is Sec. 2930.

Merchant appraisers are not only of a higher grade than the ordinary appraiser or assistant appraisers (who are appointed by the President and confirmed by the

Senate), but are of a higher grade than examiners, clerks, verifiers, samplers, messengers, or any other person employed in any of the departments of the appraiser's office. Such persons, however, have nevertheless been held to be of the grade of officers; and are in practice and by statute appointed by the Secretary of the Treasury. Thus the examiner in practice places his initials upon the invoice he examines, but his signature is no appraisal. He is a mere assistant to the assistant appraiser, whose signature when followed by the approval of the appraiser, is requisite to constitute the appraisement (Arts. 454, 455, Rec., fol. 85). Yet the examiner is the appointee of the head of a department, and so are clerks, verifiers, samplers, openers, packers, and even messengers. By section 2940 U. S. R. S., the secretary appoints such examiners as may in writing be determined by him "to be necessary to aid each of the assistant appraisers"; but no person shall be an examiner who is not "practically and thoroughly acquainted with the character, quality and value" of the article he is to appraise. Moreover, such person shall take the oath *of office;* and shall not "be employed in any commercial or mercantile business, or act as agent for any person engaged in such business"; and all provisions relating to the duties of appraisers or to any proceedings consequent or dependent upon the action of appraisers shall be construed to apply to them (see R. S., Sections 2941, 2942 and 2539).

These provisions are referred to as affording statutory illustrations of the grade, functions and sources of authority of employees whose compensation within certain limits is fixed by the Secretary of the Treasury, who appoints them. Such appointees are unquestionably "employed in the Civil Service of the United States," whether they are appointed for or paid by the day, the hour, the week or the month. The method of their stipend and the duration of their service are exclusively determined by the Secretary of the Treasury.

In all of these respects except in respect to the source of their appointment and the dignity of their functions, these employees do not differ from merchant appraisers. Both belong to the class of officers or employees in the Civil Service.

For all purposes of the customs revenue in the administration of the statutes and regulations of the Treasury Department, all of these appointees enjoy the dignities and are subject to the obligations and penalties of officers of the customs revenue. Thus it has been held at Circuit that an examiner who knowingly aids in the appraisement of goods at less than their true value is liable to be convicted and punished under the section describing such offences when committed by any "officer of the Revenue," as provided by section 5444 (U. S. vs. Thorne, before Benedict, J., S. D. N. Y., not reported).

For the purposes of this discussion, the *grade* of a merchant appraiser as an officer is unimportant; his function and source of authority only are important. The measure and nature of his compensation are worthy of consideration only in connection with the Civil Service Statute of 1883; and as illustrating that he was not the nominee of the importer or the selected arbitrator or Referee that used to serve under a similar appellation under the statutes as they existed half a century ago. These statutes are referred to elsewhere in this argument. It may be noted here, however, that (see Record, p. 49), the compensation of merchant appraisers is, by article 472 of the Treasury Regulations, to be five dollars per diem, "to be paid by the party taking the appeal," such payment to be enforced by withholding delivery of the importer's merchandise. In support of this regulation the Treasury Department refers to R. S. section 2725, by which "merchants who may be appointed to act as appraisers" under section 2609, shall receive five dollars a day. Reference to section 2609 shows that section to relate exclusively to the instances where merchant appraisers are appointed by the Collector at ports for which no appraiser is provided by law. There is no provision anywhere in the Revised Statutes for the compensation at any stipulated rate whatever, " to be paid by the party taking the appeal " to merchant appraisers who shall be appointed by the Collector, pursuant to section 2930. This petty imposition which for many years has been practiced by the Government upon importers, by which, under stress of the Treasury Regulations, the Government escaped paying these illegally appointed merchant appraisers, has at last been removed, as a result of a decision in the case of Iselin vs. Hedden, 28 Federal Reporter, page 416, where it was held that there was no statute authorizing such a charge upon importers. This charge has now been discontinued ; and under some authority of the Department not published in the regular series of synoptical decisions, the merchant appraisers it is understood are paid by the Government at the rate of " not exceeding three dollars for every day " employed, if actually engaged, under section 2733, providing for compensation at that rate for persons whom the " Collector may find it necessary and expedient " to employ in aid of the revenue.

This very payment of merchant appraisers under Sec. 2733, by virtue of which (fol. 121) inspectors of customs are regularly paid—persons whose character as officers of the customs has long since been established—shows not only that merchant appraisers are Government officers, but also that the fact of their being Government officers is now emphasized by the Government itself.

It could not with any propriety be said that an employee or officer appointed by virtue of the mandatory provisions of section 2930 to perform statutory functions in the assessment of duties was one of the employees or subordinates which a collector at his option might find it " necessary and expedient to employ " in aid of the revenue. The employment was not according to the collector's choice and judgment touching its necessity or expediency, but by virtue of the mandate of the statute in section 2930; the appointee's name only being subject to the determination of the Collector. This name might be that of one of the four general appraisers, or of two merchants. Except in respect to merchant appraisers, the collector in the whole statutory range of the customs service has no other authority to appoint. He may *nominate* to the head of a department, but it is the Secretary in all such cases who *appoints*.

In this connection it may be observed that the Collector by virtue of his office has no right to make an appraisement except in special cases, as where there is a disagreement between the two appraisers he shall have appointed under Section 2930. When he makes the appointment of "two discreet and experienced merchants" under section 2930, those appointees exercise, respecting the invoices submitted to them, offices identical with the General Appraiser, who may and who may not act instead of one of the merchants, as the option of the Collector may determine. It may be that in the Collector's judgment it is "impracticable" to associate, as a member of this appraisment board, one of the so-called "general appraisers" instead of one of the merchants. Of this emergency the Collector seems to be the exclusive judge according to the statute. Now there are but four general appraisers for the whole country, and they are not local officers, nor are they appointed to appraise specific cases. They are commissioned to be employed in visiting such ports as the Secretary may deem useful for the security of the revenue, and at such ports afford aid and assistance in the appraisement of merchandise as may be deemed necessary by the Secretary "to protect and insure uniformity in the collection of the revenue from customs." (R. S., section 2608.) These officers are executive aids. They have no power to certify to any appraisement except as it is specially given them by virtue of a special designation by the Collector under Section 2930, when acting exclusively in association with a merchant appraiser appointed under that section; and then only in the specific cases referred to such officer. Such referrence is supposed to proceed because of the peculiar knowledge and judgment such appointees may have attained as experts in the particular line of inquiry to be submitted (see Treasury Regulations, articles 1407 and 474, Record, folios I12 and 94). The Collector must designate a general appraiser for each invoice, or else he must name two discreet and experienced merchants; or he may name two merchants, and to them send all the invoices of his port which are the subject of appeals. In the case at bar he did neither. The defendant introduced in evidence at folio 54 (against plaintiff's objection and exception) a notice signed by the Collector, addressed to Lewis Heyl, the General Appraiser, that a merchant appraisement would be held the next day with Mr. Read as merchant appraiser; but the Collector did not say that he had designated Mr. Heyl to act with Mr. Read, or that he had designated some other person to act with him, either as merchant appraiser or otherwise. This notice cannot be said to be an appointment with Mr. Heyl to act in association with Mr. Read, or of Mr. Read to act with Mr. Heyl, so as to constitute the statutory tribunal under section 2930. Nevertheless it is claimed by the Government to have that significance.

So esteemed, however, these two appointees proceed in accordance with the Treasury Regulations, the most important parts of which are incorporated at pages 42 -66 of the Record.

III.

The Treasury Regulations, regardless of any statute upon which they may be founded, if not in contravention of positive law, suffice of themselves to constitute the merchant appraiser a dignified and superior officer.

Conceding that the Treasury Regulations are not *ultra vires*, they clothe the merchant appraiser with all the functions of an official character, and establish him beyond question as "an officer" of the customs revenues.

For instance, in respect to the invoice before the "tribunal," there is no distinction in the *quantum* of authority between that exercised by the General Appraiser and his associate the merchant appraiser. Both exert the same jurisdiction and powers, neither having any conclusive authority without the agreement of the other. In the event of a difference it is the certificate of that difference only that gives the collector a right to perform the duties of an appraiser, and that renders the conclusions that may be arrived at by either member of this board nugatory and worthless. Merchant appraisers, by Article 1416 Treasury Regulations, are expressly directed to be governed by its provisions; to *limit the hearing of the importer* to the statement of one person only in his behalf, to hear only concise *statements of facts* and *not to hear arguments*, and otherwise to pursue their inquiries "in such manner as *they* deem most conducive to a just and equitable determination of the question." They are to make a special report in writing (Article 1417). They shall closely inspect articles ordered for appraisement, and where they retain doubts submit samples with their opinions to Collectors for transmission to the Secretary (Article 1409). They must "rigidly" exclude unauthorized persons from the rooms where goods are awaiting or are under examination for reappraisement" (Article 1410). They must "dilligently examine and inspect such goods" as the Collector may direct (Article 1408). They must file in the Collector's office all testimony in writing, all depositions taken by virtue of their office (Article 479). And they must, "by all reasonable ways and means in his or their power proceed to ascertain, estimate and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise at the time of exportation, and at the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels or quantities, and such actual market value or wholesale price of every of them as the case may require" (Articles 475 and 477). They proceed "agreeably" to the statutes applicable to original appraisements (Sec. 2930). They are not to permit their proceedings to "assume the nature of a judicial inquiry where judgment is rendered in accordance with the preponderance of testimony on either side" (?), but should proceed as experts "to ascertain whether the local appraiser has reported the true and proper market value of the merchandise in question" (Article 474, folio 94). They receive from the Collector the invoice or invoices of the "merchandise to be examined and appraised"; whereupon they procure from the storekeeper or other officer having charge of them the samples or packages ordered for examination, and proceed "to examine and appraise in the manner pointed out by law"; "the valuation having been determined," they report the same to the Collector (folio 469). Having received in the first instance from the Collector their notice of appointment in the form prescribed by regulation (Article 467, folio 91) *they take the oath of office* prescribed by Article 468. It is supposed that before they begin their operations the Collector has called upon the local appraiser to inform him "whether additional samples or packages" of the goods are necessary to secure full compliance with the law, and the subordinate officer sends more or less samples according to his will. (Article 464.) They may summon witnesses and administer oaths and take depositions in writing which shall be "preserved for future use or reference and transmitted to the Secretary of the Treasury." (Article 459.) They must make their examination of the articles at the public store and before they shall have been delivered to the importer, unless special permission in exceptional and specific cases shall otherwise be granted. (Articles 447 to 451.) They may also procure the redelivery to them of further packages, if necessary in their judgment. (Article 452.)

"The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question (suppose he is not ?) and it is presumed that the general appraiser will have, or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his *official duty* with a due regard for the rights of all parties, and *independently of the testimony of interested* witnesses" (fol 117). Why should an officer have the right to take testimony and be instructed to act independently of their testimony ?

"The functions of the reappraising board are the same as those of the original appraisers. They are themselves to appraise the goods and not to depend for their information upon the appraisement of so-called experts in the line of the goods in question." The reappraisement proceeding is not "in the nature of a trial in a court of law wherein the reappraising officers sit as judges and render decisions according to the preponderance of testimony adduced." (See Record, p. 60.)

These quotations from the order of the Secretary of the Treasury themselves establish in connection with the regulations above quoted, the dignity and public functions of this high office. He is repeatedly ordered to *obey the Secretary*, and under the statutes and regulations must necessarily obey him, unless it may be in the execution of some plainly unlawful direction. The Secretary directs him in acting with the general appraiser to "reappraise the merchandise in substantially the same manner as is pursued on original appraisement" (Record, page 61) and to summon and examine witnesses on oath "touching anything which they may deem material" in the performance of their office. In the same breath they are instructed that "there is no authority for the public examination of such witnesses, or their cross-examination by importers or counsel employed by such importers" (Record, fol. 119).

Here is an *officer*, call him ministerial or *quasi* judicial as you please, having pretended authority to take testimony in private and without opportunity for cross-examination! It is difficult to assign a tribunal of this authority to any one of the three departments recognized by the United States Constitution. If this authority be a lawful one surely it establishes an "executive office" that "is essentially executive." Statements of merchants and others "shall be taken in the presence of official persons only." No representative of an importer shall be present except "his employee or salesman; there is no office here for the lawyer." The merchant appraiser takes the sworn statement and compels it. Is he not an "official"? Persons "not officially called before the appraisers" are to be excluded. These merchant appraisers, as well as all other appraising officers, are to act officially under the Secretary's directions "to the end that the tariff laws may be strictly enforced." These quotations are from Secretary's order, Record, pages 61, 62. While they may adopt any reasonable and proper means of ascertaining the value as *they* think proper (although the statutes fix the methods), "unless on the face of the appraisement corruption or irregularity appears their findings cannot be questioned. The law constitutes them the tribunal for this specific purpose and their valuation must be their own impartial judgment"; which upon being certified is a finalty and with it "neither the President nor any head of a department nor the Courts can interfere so long as the forms of law are followed." * * * (See Record, pages 63 and 64). In the case at bar the Court held that if the appraisers fairly did what *they* thought proper it was sufficient to exclude further inquiry (folio 73). These treasury instructions have secured the weight of some judicial authority, except where they contemplate the examination of witnesses exclusively in the absence of the party interested, or after the exclusion of his counsel. Even those exceptions, however (which are disregarded in practice), are valueless if the fairness and reasonableness of the proceedings of the Board may not be the subject of judicial scrutiny, as under the rule in this case they could not be, and as it has been held in other cognate cases in other circuits. A partial report of the judicial ruling referred to is contained in an extract therefrom, published in a Treasury Department circular, quoted at page 64. The entire judicial opinion referred to, however, is not there quoted.

It is thus made clear that by all the definitions and institutions of OFFICE, the performance of a merchant appraiser's functions under the Treasury Regulations constitute him an officer, and establish his return, report, certificate—whatever it may be termed—as the only warrant upon which duties may be lawfully exacted in cases upon which he acts. Until the merchant appraiser makes his decision the Collector has no power to exact the duty. Upon the invoice described in the appraiser's return, preceded by the appraiser's oath of office and the Collector's appointment the functions of the merchant appraiser's office are exercised.

Whether the effect of exercising that function shall be to exempt the citizen from a tax to which he would otherwise be lawfully subject, or to impose a tax or penalty which this merchant appraiser's signature gives the Government the right to demand, need not be considered at this point. It is sufficient that the public nature of his duties are described and the special authority designated as the exclusive warrant by which he performs them. This nature and authority establish the *office*. If established outside of constitutional provisions the office itself is nugatory and with it falls all that is dependent upon it.

IV.

This Court has established these MERCHANT APPRAISERS *as* CUSTOMS OFFICERS, *and has so described them respecting the official exercise of their extensive and exclusive powers.*

The latest exposition of their OFFICE is found in *Hilton vs. Merritt, 110 U. S., 97*, where their determinations are repeatedly spoken of as the valuations of "customs officers."

In that case the defendant had officially expressed his surprise that three "discreet" merchants had differed in their conclusions from the general appraiser; nevertheless, the Court excluded testimony as to whether there was a fair examination of the goods; as to whether market value described in the statute had in truth been ascertained; as to what was the record of the proceedings of these appraisers; and as to whether their conclusions corresponded with the evidence before them or with the essential requirement of the statutes. The Court held that such evidence "tended only to show carelessness or irregularity in the discharge of their duties by the *customs officers*, but not that they were assuming powers not conferred on them by statute," and that such issues were "immaterial and irrelevant," that "Congress had said that the valuations of the *customs officers* shall be final;" and if their proceedings are open to review "we must strike from the statute the clause which renders the valuation of dutiable merchandise final." In at least seven different instances are these merchant appraisers characterized in this opinion as customs "officers." The unconstitutionality of their appointment was not presented or considered.

It is there said that the apparent intent of the Legislation was to exclude any other method of ascertaining the dutiable value of imported goods except by the conclusions of these "officers," who constitute a "special tribunal," whose judgments are "final," and whose proceedings shall not be exposed in evidence. Justly or iniquitously, by erroneously applying the complicated legal rules for ascertaining dutiable value, or by vicious caprice, the fiat of these extraordinary officials impose penal duties that in their nature imply perjury in the importer's oath on entry. Their signature becomes the warrant for exactions far in excess, it may be, of any possible value of the thing assessed; equivalent sometimes to confiscation.

Their assessment establishes a debt for which *indebitatus assumpsit* will lie in favor of the Government; for it has been repeatedly held that the obligation of the importer to pay the duties regularly assessed on his importotion may be enforced in a personal action.

V.

While it is believed that Congress never really designed to withdraw the proceedings of these appraisers from the *constitutional scrutiny of the judiciary, it is nevertheless no longer open to question that by statutory interpretation, Department regulation and judicial determination of the highest authority, these appraisers have become essential factors in the present scheme of revenue administration, and* "CUSTOMS OFFICERS" *of power and authority "inferior" to none in the United States Revenue system.*

The statute (Sec. 2930) necessitates their review of the action of officers appointed by the President and confirmed by the Senate. They are "superior," not "inferior," to officers so appointed. It is respectfully submitted that it is not within either the spirit or the letter of the Constitution that such a *superior* officer should be selected by an authority "*inferior*" to the constitutional source of authority which commissions the officials, whose determinations are thus to be reviewed.

In any meritorious constitutional sense, the "special tribunal" of review should be commissioned at least by as high authority as the "inferior" officers, whose acts are thus revised. The "superior" officers comprising this "special tribunal" are not, it is submitted, even "inferior officers," who may be appointed by heads of departments or courts of law, much less by the Collector of a port. It is not within the constitutional power for Congress to bestow on collectors the power to appoint any officer whose determinations constitute an assessment of duty.

Yet this appointee, this "special tribunal," these merchant appraisers, have in fact no other function except to make assessments of duty, and that function is exercised exclusively when revising assessments made by other officers. Great powers are vested in them for that purpose, for the exercise of which they alone are responsible. Their responsibility is to no constitutional source.

Are their offices ministerial or judicial? Are they umpires, arbitrators or executive agents?

It is unimportant how they may be designated. "Officers" they are in *any* aspect.

Arbitrators they cannot be; for that office implies a consent to submit to the arbitrator.

The importer has no voice in this statutory and enforced "submission." In the case at bar he specifically objected.

It has been repeatedly declared that there was no other method whereby the importer might test the merits of an appraiser's acts in assessing for *ad valorem* duty except to file notice of dissatisfaction therewith, and thereupon the Collector proceeds under Sec. 2930. The importer submits nothing; and has no umpire, arbitrator or Referee. He is wronged, and is dissatified. He is refused a hearing in the Courts. He hopes his expressed dissatisfaction may bring relief; and is again barred from the Courts by the "final and conclusive" edict of the Collector's "special tribunal."

Judicial scrutiny is outlawed if the members of this special tribunal testify that *they* made a sufficient examination to satisfiy *themselves.*

They satisfy *themselves* that *they* have complied with the statutes, and the law is satisfied although the statutes may in truth have been absolutely disregarded; or as the Court below put it, in the case at bar, "all that the law requires is that they should fairly make such full examination as *they* deem sufficient to enable *them* to decide the question submitted for *their* determination" (Record, p. 40–36). "All objections as to the irregularity of the proceedings" were (*Ib.*, p. 16), beyond the judicial cognizance, unless their whole course was "void."

This doctrine would dignify these high officers with an irresponsibility greater than that of any other federal official.

It requires no argument to sustain the proposition that if the merchant appraisers' determinations are conclusive unless absolutely void, then he must be commissioned by the constitutional source of all official authority.

Official acts are void if performed absolutely without power, jurisdiction or authority.

They are voidable only if having jurisdiction, the official act is in excess of the authority under which it is performed; or if having power it is exerted otherwise than in conformity with the law. Thus an officer may have power to assess a tax according to weight; yet he may assess the tax for twice the prescribed weight and his proceeding not be void, but voidable only, and subject to the correction of his irregularities as the proofs in a proper proceeding may demonstrate.

Whatever was the character of the merchant appraiser's position in the past under statutes now abrogated, for the present generation, and under the present law he is nothing more or less than a government officer, and is so esteemed and acknowledged in practice.

The constitution of the Board of Reappraisers has gradually and steadily changed, but always to the Government's advantage. The board belongs to its creator and ruler; it is the Government board.

Having none of the elements of a reference, or an arbitration, or a court, or of a commercial performance, constituted as it is without the knowledge (fol. 58) or participation of the importer, proceeding as it does to examine and sample in the enforced absence of the importer (Rec., p. 21, Art. 1410, p. 59) taking sworn evidence of competent and incompetent witnesses, while the importer is excluded and not permitted to cross-examine, this "special tribunal" has become a foil to conceal official motives, to fortify incapable subordinates, and to masquerade in "*quasi*-judicial" attitudes as novel as they are imperious.

It used to be said in favor of the old Board of Repapraisers that they were a tribunal constituted in part upon the importers' selection; and that their conclusions had somewhat the force of a statutory award. Now, every element of consent, submission, has passed away; and the "special tribunal" is nothing unless clothed, as has been recently assumed (fol. 125), with power to conceal "the particular facts and circumstances connected with their findings," and the conclusions upon which their judgments are found, and with authority to "adopt *any* reasonable and proper means," legal or not, to arrive at a judgment with which "neither the President nor any head of a department, nor the Courts can interfere so long as the *forms* of law are followed!" This quotation is from the Secretary's order. (See Record, pp. 63-64).

VI.

If anything could be wanting to show that the position of merchant appraiser is an *office*, whose incumbent, therefore, is an *officer*, the Court below in the case at bar has furnished it in the judicial declaration that Mr Read, the appointee in this case, was an officer.

The Court said this appointee was " to perform certain prescribed duties " (Rec., p. 15), and that his appointment invoked " the highest discretion he (the Collector) was called upon to exercise " (*Ib.*, p. 16).

" The duties to be performed by this merchant appraiser are of a semi-judicial character " (*Ib*).

Even if the appointee be "not the kind of a person to whom " the Collector's choice was limited, the Collector alone selects him, "*and no one had any right to object to it,*" even if the appointee had not "the requisite knowledge " (*Ib.*, 16, 32).

The Court had "no power of revision over their proceedings;" and the reappraisers' decision is made final.

Their proceedings are "arbitrary," but "if Congress had the power" to make them so, the judiciary cannot correct the enactment. Nothing "tending only to show error" on the part of merchant appraisers could be received in the Courts (*Ib.*, p. 17).

There is not an officer in the customs service with the equivalent of this power. Hundreds of persons employed by the day simply to inspect and report, or to weigh, to measure, to search or to seize, are officers of much less dignity, less power and of less continuous employment.

The learned Judge below, in further description, said: The merchant appraiser acted "merely in an *official* capacity" (fol. 60); he was a member of a "tribunal" "lawfully constitued" on the Collector's selection, and having "all the authority which the law gives to a tribunal for the ascertainment of the value of imported goods" (fol. 66). The findings of this "tribunal" are final; and their "errors," even unto those "which are in the mere category of *irregularities*," harsh though they be in results, are "not a matter for our consideration at all" (fol. 66).

Is any doubt possible that the merchant appraiser is an officer, the incumbent of an office; and as between the importers, plaintiffs and the Government, the most important officer in the whole range of the customs service? In this case, too, the individual "officer" was quite accustomed to his office. He testified glibly as to his "usual custom in such cases" (fol. 45), which may be as few or as numerous as the appointing power sends to him.

Records are docketed in this Court instancing services of long duration and on one and on many cases of New York merchant appraisers, and also instancing the disposition of multifarious cases at one time. It is common knowledge that like the successive incumbents of a village post office the favored appointees generally come from the same set of men. The functions of the office and its facilities in acquiring valuable information prove stronger attractions to commercial men than its meagre emoluments.

The office also furnishes the Collector with his exclusive statutory patronage, exempt from approval by other authority, and hitherto one remove from the inquisitions of a Civil Service Board.

The single and exclusive *judicial reason* assigned by the learned Judge below *for sustaining the Collector's right to appoint*, or, as stated from the bench (Rec., fol. 35), " which induces me to assume the act as constitutional, at least not to declare it unconstitutional," is contained in the " admonition " " *never to butt my head against the Constitution* of the United States where I could avoid it."

The learned Judge thinks "it must excite our special wonder " that the question has never been suggested or passed on before. It is only in recent years that controversies about values have ceased to be brought into courts by the Government which now settles them in its own fashion under bureau rule. Scarcely any cases arising upon dutiable values are found reported for nearly a score of years ; and in this Court one only since the Revised Statutes, and in that the protest did not present the questions raised by the case at bar.

The learned Judge doubtless had no occasion to know that the present questions had been previously mooted and seriously considered, and on one occasion elsewhere argued. He concludes all that the Court said below upon this topic, however, as follows : "I cannot forget the admonition given me by one of our most eminent Judges of the Supreme Court of the United States, at the very beginning of my judicial career, never to butt my head against the Constitution of the United States, where I could avoid it. Under the present circumstances I think it would be *unwise* for me to declare an Act of Congress and proceedings under it unconstitutional."

The learned Judge thus conveys the impression that if he were a Supreme Court Judge he would vote otherwise.

VII.

The merchant appraiser being an officer or employee in the customs service is amenable to the Civil Service law.

He is " not employed merely as laborer or workman,' and therefore falls within " Civil Service classification ' of the Treasury Department, at $5 per day (Art. 472, fol. 93) or even at $3 per day (less than some customs inspectors per diem, and who come within the classification). The merchant appraisers' " employment " is to be measured by that classification reproduced at Record, p. 17. He may be placed indifferently in class A., class 1, 2 or 3. It is the same for the purpose of this case.

The statute reads (Ch. 27, Act. Jan. 16th, 1883):

" SECTION 6. That within sixty days after the passage of this act, it shall be the duty of the Secretary of the Treasury * * * to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be altogether as many as fifty, and thereafter, from time to time, on the direction of the president, said secretary shall make the like classification or arrangement of clerks or persons so employed, in connection with any said office or offices in any other customs district. And upon like request, and for the purposes of this act, said secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents or persons employed under his department in any said district not now classified; and every such arrangement and classification, upon being made, shall be reported to the president. * * *

" SECTION 7. That after the expiration of six months from the passage of this act, no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing or that may be arranged hereunder, pursuant to said rules, until he has passed an examination or is shown to be specially exempted from said examination in conformity herewith."

Then follow exceptions applicable to discharged soldiers, sailors, judicial officers, laborers, etc., not required to be classified (22 U. S. Stat. L., p. 405).

It thus appears that the statute prohibits the appointment of any *officer or other person employed* by the collector who comes within the established classification, except when such appointee shall have passed an examination or be shown to be specially exempted therefrom according to law.

The official classification pursuant to this section was offered in evidence (see Rec., p 17) together with the proof that being in force at the time and place of Mr. Read's appointment, Mr. Read was not examined or appointed pursuant to that statute.

If the collector, prior to 1883, had the *absolute* right of appointment, the prohibitory terms of this later act against civil service appointments except as there prescribed is controlling.

It was, therefore, error to exclude the evidence which was claimed to vitiate Mr. Read's warrant of office or right to act. This claim as well as all other claims of plaintiff's made on the trial had been covered in the importers' protest (fol. 26).

If the merchant appraiser be an employee as distinguished from an officer, only " discreet and experienced merchants " who have retired from business may be so employed, because under Sec. 2941, R. S., such employees shall not be engaged in any commercial business.

VIII.

The section (2930) is WHOLLY *inoperative* BECAUSE *of its unconstitutional features.*

In Allen vs. Louisiana, 103, U. S. R., 83, it is said :

> " It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected ; but (2 Gray, 84) ' if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.' The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature."

In Trade-mark Cases, 100 U. S., 98, it is said, beginning with a quotation from WAITE, C. J. : " ' We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of these sections must stand as a whole or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the constitution * * * To limit this statute in the manner now asked would be to make a new law, not to enforce an old one. This is no part of our duty.'

If we should in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

Thus plaintiffs in error insist in this case that it is not within the judicial province to give to the words in section 2930 a narrower meaning than they are manifestly intended to bear. The appointment and office of the merchant appraiser, under section 2930, is the essence and validity of the section. It is not within the judicial province to eliminate from the statute the office as here established and provided for. Such elimination is a destruction of the section.

In 114 U. S., 304, Virginia coupon cases, it is said: " It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctively separable that each can stand alone, and when the Court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact. An illustration of this principle is found in trade-mark cases, 100 U. S., 82, where an Act of Congress which was claimed would have been valid as a regulation of commerce with foreign nations and among the States was held to be void altogether because it embraced all commerce, including that between the citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which *was* subject to the control of Congress. If we should in the case before us undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

The plaintiffs in error insist that it is not within the judicial province to disintegrate section 2930 so that the substance of its board of review shall remain for importers who may be dissatisfied with the appraisement otherwise provided for by Chapter VI. of Title 34. The section must be absolutely eliminated from the statutes. Any construction which must be strained or forced upon section 2930 with a view to give it some practical operation disassociated from the appointment and action of the merchant appraisers as therein specified, would unquestionably " confer upon the statute a positive operation beyond the legislative intent—beyond what any one would say the Legislature would have enacted in view of the illegality " (quoted from the principle as followed and stated in Spraigue vs. Thompson, 118 U. S., p. 95),—the unconstitutionality if brought to the mind of the legislators, of the establishment of merchant appraisers to be appointed by the Collector.

IX.

Merchant appraisers' acts are voidable if irregular if the " special tribunal " does not act strictly within its explicit scope of authority. If it disregards any statute, its proceedings are open to judicial investigation and action.

Any other view would negative the requirements of law, and constitute the executive official his own judge as to whether his acts were lawful or unlawful. It would remove his determinations from the cognizance of the courts, and institute a novel standard of official performances. It would arrogate to the executive the power of interpreting laws, and annihilate the salutary power of the judiciary to enforce executive accountability. Such a suggestion is alien to the spirit and genius of our jurisprudence. Duties are to be assessed by "uniform laws." Taxes are imposed by Congress as the result of the operations of law, not of the immeasurable and infallible performances of revenue officials. Individual property is protected by fixed rules prescribed by the law of the land, and is not enjoyed at the discretionary forbearance of any official or tribunal. On the other hand the Government revenues are not dependent on the caprices of special officers, but on the uniform application of Congressional standards to specified objects according to prescribed methods incorporated in the law of the land. In the operation of that law each department of the Government—the legislative, executive and judicial—performes its proper function; and it is not within the power of the Legislature to withdraw from the judiciary the exercise of that function to hear and determine in a proper case brought according to the course of the common law, the legality or illegality of an executive performance in alleged disregard of private rights under the law.

X.

Evidence was admissible as to the "character and value" of the merchandise (fol. 33).

This evidence, although offered in many forms, was in any form rigidly excluded by the Court. As expressed in the deliberate opinion rendered, after full argument upon all the offers (as made at folios 27, 28, 33, 34, 35, 39, 42, 48, 49), the Court below decided: The testimony offered has "reference to the mode of procedure before the appraisers and the result of their act. Can the valuation be assailed? I do not see how it can. The positive reading of the Act of Congress is, that the decision of the appraisers shall be final. I regard the question as substantially decided by the decision of the U. S. Supreme Court in 110 U. S. Reports. *The question there was* not exactly *similar to this*, yet the Court ruled that all objections as to the irregularity of the proceedings before the appraisers, whether their decision was sound or not were excluded. * * * What they decide is made by act of Congress final; and although it may seem to be an arbitrary proceeding and *is an* arbitrary proceeding, yet may be a necessary enactment, and *if Congress has power to make it*, we are bound by it, and we cannot correct the character of the enactment by the usurpation of power on our part."

See *Record, pp. 16, 17.*

This determination was afterwards further applied to exclude circumstances claimed to be otherwise competent for consideration, which would aid in furnishing knowledge to the jury of the actual character or quality or value of the goods. (See exception at Record, top of page 24, and fols. 49, 48, 43, 42, 33, 80.) Thus, the exhibition of the identical samples on which the appraisement was made, for the purpose of testing their fairness as representing the invoice.

Without the exhibition of these samples before the jury, testimony as to their fairness or unfairness would be futile on the part of the plaintiffs. Mr. Read had been permitted to testify against plaintiffs' exception (fols. 42, 43) as to the *character* of all the samples produced. Such testimony is meritoriously responded to by exhibiting the things themselves to the jury's inspection, accompanied with competent testimony of the "character and value of the samples. Thus also would be tested Mr. Read's familiarity "with the character and value of the goods" required by the statute.

The incontestible meaning and effect of the ruling of the Court below was avowedly to instal the conclusions of this "special tribunal" of reappraising officers, as the final determination by which the import duties on the importation in question should be irretrievably measured.

In other words, the rate and amount of duties payable on the importation, was the result of the judgment of the Collector's appointees!

It should not be necessary to argue that while Congress possesses power to lay and collect imports, it is not constitutionally competent for Congress to depute that power to one or many executive officers. Having described by statute the "uniform" duties it designs to impose, Congress, it is true may, within certain limitations, prescribe the means by which imports shall be collected. If those means, however, extend so far beyond the scope of ministerial action as in effect to exert directly the power of taxation to the point even of absolute confiscation, it may well be questioned whether Congress is not unwarrantedly imposing on the executive department tasks which constitutionally are the exclusive prerogative of the Legislature.

"The power to tax is the power to destroy." That such a power should be exercised dogmatically, capriciously, inscrutably by the executive, so shocks the judicial sense as to receive adverse comment from the Court below in the case at bar.

This departure from Congressional prerogative should not lightly be presumed.

While, therefore, resisting its constitutional possibility, plaintiffs in error respectfully insist that neither the Revised Statutes themselves, nor any controlling interpretation of them warrant the proposition that

Congress, instead of its own standards, intended that appraisements representing official caprice should measure the amount of revenue.

If the naked fact that a formal appraisement has been made constitutes the irremediable amount of revenue collectible or payable on that importation, then it would have been quite unnecessary for Congress to have exercised itself (as it often has) as to whether the standard of *ad valorem* duties should be the home market or the foreign market, the place of production or the place of shipment; or as to whether the duties should be reckoned on the "net prime cost," or on one stated percentage above the actual cost if imported from the Cape of Good Hope, and on another stated percentage if imported from elsewhere.

If official appraisements irrevocably measured the amounts of the revenue, it was idle for Congress to struggle as it did in the effort at one time to collect and at another time to relinquish duties on various commissions and charges, which sometimes were and sometimes were not to be included in the *ad valorem* standard. The official appraisers had but to certify a result, no matter what items they considered, and duties were leviable accordingly.

Had Congress intended that this certificate should be accorded so potential a dignity, it would not from time to time have changed its *ad valorem* standards; *e. g.*, from actual cost to market value; from value in place of production to value at place of exportation; from value at time of purchase to value at the period of exportation; from a wholesale price including commissions to one excluding commissions; from a value including trade-marks to one regardless of trade-marks; from a wholesale "market value in the principal markets of the country" of exportation, where it is supposed there exists such markets for the article in question, to the cost of manufacture, where it is supposed such markets do not exist.

Surely, since 1789 successive Congresses would not have struggled over legislation upon these details, had the judgment of the executive as to what should be the *amount* of duties been designed to afford the final measure of the revenue.

The proposition is too startling to be accredited. It is true that there are some judicial expressions affording color to the suggestion that these executive appraisements preclude investigation as to whether the appraisement was according to the Congressional standard, or by some other standard, or by no standard at all, or by erroneous comparisons, or according to domestic instead of foreign values; yet such expressions will only be found in exceptional cases arisising under legislative conditions totally inapplicable to the case at bar, and readily distinguished from it.

Besides the more recent expressions of the Supreme Court in the cases of Morill vs. Jones, 106 U. S., p. 466; and of Oberteuffer vs. Robertson, 116 U. S., p. 499, uphold the right of the judiciary to scrutinize "in a proper case" all the details upon which depend any Congressional impost; while these decisions denote the application of the judicial arm to restrain executive action within the limits prescribed by the Legislature.

XI.

There is no judicial authority for the proposition applied by the Court below in the case at bar, that official appraisements were controlling as to *rates* when the classification of dutiable merchandise depended upon value.

The case of Hilton vs. Merritt was not a case of assessment upon the appraisement of a merchant and general appraiser. They had disagreed, and the assessment was by the Collector, whose decision, it was claimed, was expressly open to contest by the words of Sec. 2931 providing for suit in the event of suitable protest against "the rate and amount of duties." The Court in that case expressly reserved for judicial investigation the merits of protests affecting the *rate* of duty. It declared that "questions relating to the *classification* of imports, and consequently to the rate and amount of duty, are *open to review in an action at law*. This construction gives effect to both provisions of the law."

By the rulings in the case at bar, however, plaintiffs were precluded from questioning the rate assessed of 24 cents per pound, and 35 per cent. *ad valorem*, plus 20 per cent. on the sum thus ascertained; although as plaintiffs claimed, the only lawful duty possible to be arrived at by observing the Acts of Congress was assessable at 18 cents per pound and 35 per cent. *ad valorem*, and no more. Besides, as plaintiffs claimed, the *ad valorem* rate should have been estimated upon the value sworn to on the entry, and not upon the value stated in the unlawful certification of the official appraisers. Here are four items questioned, viz.: (1) Rate per pound. (2) Amount on which the rate *ad valorem* is to be computed. (3) An additional or penal duty of 20 per cent. on the sum of these two duties, and (4), the difference between the amounts of the *ad valorem* rate (35 per cent.) estimated upon the *invoice* value and that rate calculated upon the increased or certified value.

In the case at bar the Court precluded plaintiffs from questioning any of these items, although plaintiffs, in paying defendant to procure their goods, did so under seasonable protest, and to test the extortion, instituted an action at common law as old in its character as the common law itself.

XII.

The foregoing views as to the intent and operation of existing statutes are fortified by a brief statement of the origin, purposes and scope of appraisements, and their historical relation to the *ad valorem* system.

Ad valorem duties at first (1789) were estimated upon "the actual cost" of the merchandise plus twenty per cent. thereon if imported from beyond Cape of Good Hope, and otherwise ten per cent. exclusive of all charges (Sec. 17, Ch. V., Laws 1789). Non-enumerated articles paid five per cent. on their value at the time and place of *importation* (Sec. 1, Ch. II., Laws 1789). All this was determined by the importer's oath on entry giving "an account of the net prime cost" (Sec. 13, Ch. V., *Ib.*). It was only damaged goods, or goods unaccompanied by an invoice that were the subject of an appraisement; and the appraisement was only for "estimation" of duties (Sec. 16, Ch. V., *Ib.*); or if invoiced and fraud was suspected by the collector, he selected one and the importer selected another "reputable merchant" to make the valuation for the duties to "be first paid or secured to be paid," as required in other cases of importation (*Ib.*, Sec. 22).

Substantially the same provisions were re-enacted with more liberal options reserved in provisos for the importer in the obsolete Act of 1790 (Ch. 35, Laws 1790, Secs. 37, 39, 46).

In 1795 (obsolete Ch. 17, Sec. 3) *ad valorem* duties were to be estimated "upon the actual cost at the place of *exportation*, including all charges" (commissions, outside packages and insurance only excepted).

In 1799 (Ch. 22, Sec. 61) Congress returned to values at "place of IMPORTATION," according to the method previously prescribed in Sec. 13, Ch. V., Laws 1789, and Sec. 39, Ch. 35, Laws 1790; while the scope and limitations of appraisements was continued (*Ib.*, Sec. 52) with some elaboration as to details substantially as denoted by the Act of 1790. There was only one form of entry and the oath of the importer set forth the *cost* upon which duties were assessed, unless at the importer's request sea-damage had occurred to the goods, or in the unavoidable absence of his invoice he nevertheless wished to complete his imperfect importation entry. In such instances the goods themselves, in their original packages were, by the collecter, taken to a warehouse until the dutiable figures shall have been ascertained, "either by the exhibition of the original invoice * * * or by appraisement at the option of the owner" who designated his own appraiser.

The executive act provided for by Congress was to ascertain the actual *cost*, and to this cost a fixed percentage was to be added, depending upon the place of exportation, and subject to discriminating duties if the importation came in national or certain foreign ships.

Congress so rigidly fixed the standards and rules by which *ad valorem* duties should be levied that there was no latitude for the discretion of appraisers, except where the importer sought permissive favor in avoidance of the regular statutory requirements.

The Congressional standard was again declared in 1816 (Ch. 107, Sec. 1, par. 5, 3 St., 311) that in all cases where an *ad valorem* duty shall be charged it shall be calculated on the *net* cost of the article at the place *whence imported* (exclusive of packages, commissions and all charges), with the usual additions established by law "of 20% for importations from beyond the Cape of Good Hope," etc., etc., etc.

In 1817 a supplementary act similarly defined the home standard of *net cost* for "all cases where an *ad valorem* duty shall be charged" (3 Stat., 369); and in 1818 (3 Stat., 434) repeated it, but excepted commissions, etc.

It was the *cost* also excluding or including certain additions upon which *ad valorem* duties were to be charged under the Act of 1823 (Ch. 21, 3 Stat., 730), with certain rare exceptions as mentioned in prior acts, and where the value in the country of *production* was a necessary incident in arriving at the actual cost (*Ib.*, Sec. 5).

Under this act (1823) it was obvious that *appraisements* might become of enlarged importance, and careful provisions respecting them were made which have long since disappeared from the statutes.

Thus: Section 16 provided for the appointment of two appraisers in each of certain ports; but for other ports as occasion might require, its Collector should appoint "two respectable merchants."* By its section 18, where the importer was dissatified with the primary appraisement *he might employ at his own expense* "two respectable resident merchants" who, together with the two appraisers "appointed on the part of the United States under this Act," examined and inspected the goods and reported their value if they agreed, and if not "the circumstances of their disagreement." If importer dissatisfied with the report, the case might be referred to the Secretary of Treasury who was "authorized and empowered to decide thereon, or to require further testimony in the case, in such manner as he may deem proper, and to order the goods to be entered accordingly."

This power is no longer reposed in the Secretary, but is vested in the Collector's unqualified or capricious, but unassailable appointees under Sec. 2930 R. S.

There was nothing in the Act of 1823 about the conclusiveness of appraisements; although evidence could not be admitted on the part of the United States in any Court " except ~~on~~ in a corroboration of such entry." No case is found in the Reports impugning the decision of the Secretary under this Act. It is mentioned as exhibiting the origin of the "special tribunal" provided for by R. S., Sec. 2930. In composition and power, however, the two boards may be contrasted, not compared.

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*No controversies under this section have been found in the reports. So far as the section is found incorporated in the Revised Statutes (Sec. 2609) it would, in view of its correlative sections, be held to be unconstitutional for the reasons previously stated.

Upon the slender fabric of this scheme of arbitration over a comparatively simple, single fact, has grown the claim of executive domination over the Congressional standards of *ad valorem* duty.

The standards may be more embarrassing and difficult than they were at first ; but the standards exist and the *power* of the judiciary to secure their fixity and to ensure their application in a proper case may not constitutionally be circumscribed.

Prior to 1828 *cost* at home or abroad, with or without various additions thereto as Congress vacillated, had in the absence of fraud been the standard for the assesment of duty. In 1828 (Ch. 55) the new standard was established of "*actual value at the time purchased and place*" of *exportation*, which was "in all cases" of goods subject to *ad valorem* duties, to be appraised "by all the reasonable ways and means" in the power of the appraisers and "of every other person who shall act as such appraiser." (4 Stat., 273, Sec. 8).

The methods of estimating such value for dutiable purposes was thereafter the subject of constantly varying legislation. Both in respect to specially described merchandise and in general application will Congressional standards be found in 1832 (4 Stat., 583, Sec. 2 ; *Ib.* 591, Sec. 7 ; *Ib.* 593, Secs. 13, 15) ; in 1842 (5 Stat., 548–9, Ch. 270, Secs. 1, 2) when "the principal markets of the country" of exportation were fixed as the *place* of valuation (*Ib.* 563, Sec. 16) ; in 1846 (9 Stat., 43, Ch. 74, Sec. 8) ; in 1851 (9 Stat., 629, Ch. 38, Sec. 1) when the term "wholesale price" was introduced as an alternative with "market value" and the time and place of *exportation* substituted for time of *purchase* and place of *production* in ascertaining value. Language was then (1851) used showing (as this Court said in 18 How., 525) "that Congress had changed its policy in this respect and intended to repeal" the laws inconsistent with it. Subsequent legislation touching this standard will be found in 1861 (12 Stat., 197, Ch. 68, Secs. 28, 32), and in 1864 discriminating between dutiable value and market value (13 Stat., 216, Secs. 23, 24); in 1865 (13 Stat., 493, Sec. 7, repealing last-cited sections); in 1866 (14 Stat., 330, Sec. 9) where the substance of sections 2907, 2908 R. S., is enacted; in 1873 (17 Stat. 559, Sec. 4); in 1874 (18 Stat., 188, Sec. 14) in 1883 (22 Stat., 523 Secs. 9, 7, 8).

Why should Congress have so exercised itself to prescribe standards if appraisers may apply their unrestricted and conclusive judgment?

Reference to the appraisement acts succeeding 1828 will also show it was never so intended.

In 1830 (4 Stat., 409, Ch. 147), when an appraiser ,additional to the Act of 1799, was authorized for New York, it was made the appraiser's duty to revise the appraisement of his assistant and report to the collector who, if he deemed any appraisement too low, might order a reappraisement, either by the principal appraiser or by "three merchant appraisers" designated by the collector, who should cause the duties to be collected accordingly. Afterwards, if the importer swore that the appraisement was too *high* and *gave his statutory reasons*, then he should designate one merchant and the collector another, who, if they disagreed, should "designate an *umpire*, and when they or a majority of them shall have agreed shall report to the collector; and if *their appraisements* shall not agree with that of the United States appraiser the collector shall decide between them (Sec. 3). It was under the liberal scheme of *arbitration* provised for by this act that the case arose of Rankin vs. Hoyt, 3 How., 335, when this Court commented on the arbitration opportunity which the importer in that case had failed to avail himself of as one for a "further hearing before another tribunal constituted in part by persons of his own selection," to which, if he did not resort, he could not complain. In that connection the arbitrators were alluded to as "legislative referees," to whom the importer is bound to resort before complaining of illegal exactions.

This meritorious scheme of *arbitration* before arbitrators chosen by the parties disappeared from the statutes in 1842, after which period (5 Stat., 563, Ch. 270, Sec. 17) dissatisfied importers were relegated to a reappraisement by "two discreet and experienced merchants whom the *collector shall select.* These appointees were subject to all the laws and regulations applicable to "other officers of the customs" (Sec. 24).

Whatever may have been the virtue of prior enactments, this act of 1842 hardened as it is by the act of 1851, (9 Stat., 630), which in turn has become incorporated into section 2930, is a vicious intrusion upon the constitutional source of the power of appointment. But even under the act of 1842 no reported case has been found where the judiciary refused to look behind the certifications of these collectors' appointees.

When for this harsh enactment of 1842 the Act of 1851 Ch. 38, became substituted, by which one of four "general appraisers" might be chosen by the collector in lieu of one of the "*merchant*" appraisers, the singular and questionable phrase was appended to section 3, whereby in the event of the members of this "special tribunal" disagreeing the collector shall decide between them; and the "appraisement thus determined shall be final and deemed and taken to be the true value of the goods, and duties shall be levied accordingly, *any act of Congress to the contrary notwithstanding*" (9 Stat., 630). Thus at one stroke the carefully devised standards of appraisements prescribed by previous statutes were swept away, and the "appraisement thus determined" by this unconstitutional tribunal attempted to be substituted.

Fortunately the words last italicised are omitted in the Revised Statutes at section 2930, where the third section of this Act of 1851 is restated; so that the existing enactments of Congress prescribing the current standards of dutiable value remained unimpaired and found appropriate place in the various sections of the Revised Statutes, applicable to those topics. These sections have been already quoted in this argument.

They furnish in exhaustive detail not only the substance and method of procedure, but the standards by which lawful results shall be attained. Thus an importation from China is not to be measured by the value of the same goods in Paris; nor an importation from Berlin in 1886 by the value of the same goods in Algeria in 1816. Besides, many of the various requirements of statute have received judicial construction, and officers may not disregard the law or substitute for it their private judgment.

Appraisements must, therefore, be in all respects lawful in substance and in form. The statute must be deemed to speak of *lawful* appraisements as "final;" and the "duties shall be levied" accordingly.

The reasonable meaning of this language is that there shall then be an end of appraising.

Duties "shall be levied" is a constantly recurring phrase in our revenue laws. It has never been construed to foreclose judicial cognizance. The successive schedules of our tariffs have generally been introduced by the phrase that duties "shall be levied, collected and paid," etc., etc., etc. (Section 2503).

Upon the appraisement the collector must proceed to levy the duties. If upon judicial scrutiny it appears the *appraisement* is unlawful, the Courts declare it void. This is the irrevocable prerogative of the judiciary. Any intrusion upon this power should be declared in explicit and unmistakable terms, which the Revised Statutes do not attempt.

On the contrary, Congress is careful to reserve unimpaired full scope for exercise of the judicial power in all cases where judicial remedy already existed in the nature of an action at law * * * triable by jury" (sections 3011, 2931, 2932). The limitations as to time, appealing beforehand to the highest revenue official (Secy. of Treas'y), furnish no intrusion upon this remedy, except as any government may impose statutes of limitation and protection to its officers. Nor do such prerequisites furnish the grounds of the action. They afford the conditions only under which the Government permits its officers to be sued. When these conditions, however, have been complied with, the Government officer who has been made the defendant, stands before the judicial eye, subject to the same scrutiny and liabilities to the plaintiff as any other defendant. If this were not so, it would be idle to bring him under the judicial cognizance. The statutes are then to be judicially applied to the pertinent facts of the case. In this exertion of judicial power Congress has no part. It may, within certain limitations, denote methods of procedure, but it cannot direct the judicial power as to its conclusions, or restrict its investigation of any fact essential to a conclusion of the issue in the case.

Any interpretation of section 2930 leading to such a result should not be lightly arrived at; but should be resisted for one in harmony with the Constitution and genius of our institutions, particularly when adequate meaning is at the same time given to all the terms used in the statutes.

It is respectfully insisted that section 2930, fairly construed as part of a system of laws denoted in its accompanying chapters in the Revised Statutes, has no relation to and imposes no limitation upon the judicial department of the Government, its rights, duties and prerogatives. Moreover to give it significance as against the judiciary would accord to it an unconstitutional operation; and such construction is necessarily to be avoided. If this avoidance be deemed impossible then the section in that respect is unconstitutional. The distinctions between the legislative, judicial and executive departments are not to be heedlessly obliterated.

Here it may be justly interpolated that unless the merchant appraiser be an exalted "customs officer" of distinguished power this contention of his subjection to judicial investigation is as uncalled for as it is unnecessary. But the exceptional authority claimed for him as an outlaw from judicial scrutiny and an autocrat independent of the laws of Congress, makes it expedient to curb his dominion within constitutional restrictions, while his OFFICE is exhibited in all its dignities. The greater the power the greater the office. As its advocates extol this *office* they demonstrate its *incumbent* to be *an officer*. Thus again does section 2930 infringe on the U. S. Constitution (Art. 2, Sec. 2). And, if the merchant appraiser can in any view escape his official character, then, of course, must his conclusions escape official sanctity, and become like the doings of more modest and humble persons subject to the judicial scrutiny.

If the members of this "special tribunal" are "officers," the section falls. However these merchant appraisers may be regarded their acts are open to the judicial scrutiny.

As was aptly observed by Mr. Justice MILLER, in the Centennial oration at Philadelphia, under the Constitution "no man is so high as to be above the law—no officer of the Government may disregard it with impunity."

Shall appraisers disregard with impunity every provision of the law enacted for their guidance in arriving at dutiable value?

May their self-satisfaction be the measure of right, and their capricious pen the measure of a tax?

These questions seem to be answered by the Court below in the affirmative by instructing the jury that appraisers need only do what THEY *deemed sufficient* to enable them to decide (fols. 73, 78), and "their decision cannot be assailed" for error or for "irregularity" (fols. 39, 78); nor can "their valuation be assailed" (fol. 38), for although their proceeding "is an arbitrary proceeding, yet it may be a necessary enactment" which, "*if Congress had the power to make*," the judiciary cannot correct (fol. 39). It was upon this basis that the testimony of the occurrences before this Board or "special tribunal," as well as of the "character and value" of the goods, was in various ways specifically and generally excluded under appropriate exceptions (fols. 39, 35, 34, 33, 27, 28, 42, 43, 48, 49, 59, 61).

XIII.

The harmonious construction of section 2930, here contended for, is further fortified by the phrases found in Ch. 193, Act of June 22, 1874, known as the Anti-Moiety Law, where liquidation of duties shall in one year "*in the* absence of protest * * * be *final and conclusive* upon all parties; implying, as in the Revised Statutes, that payment under protest is *not* "final and conclusive" (Sec. 21). So certain *appraisements* specified in section 14 shall "*in the absence of protest* be conclusive." The uniform assumption is obvious that in in the mind of Congress there was nothing "conclusive" in the *presence* of protest and seasonable suits at law (18 Stats. 186, Secs. 21-14 and 26).

Indeed, disregarding (as we should not) the application of R. S., Secs. 3011, 2931 and 2932 to the preceding sections there is, nevertheless, this subsequent affirmative enactment of 1874 (Sec. 14) recognizing the *in*conclusiveness of appraisements and the want of finality in the market value thus arrived at in certain cases where protest has been filed. This Court, in 6 Otto, 146, Arthur vs. Goddard also recognized in a case where the dutiable value certified by the appraiser was successfully questioned; and again in Oberteuffer vs. Robertson, in a case where "in form the appraiser added the items," held to be no part of the duitable value.

Enquiry into the legality of the items of an appraisment, or in what manner—lawful or unlawful—the certified dutiable value arrived at would have been impossible under the terms expressed at the circuit in the case at bar. If the ruling below is correct it is within the irremediable power of the appraisers so to certify their results as to abrogate any or every provision of law as to how they shall be attained, or what they shall include or exclude.

Such a proposition is refuted by its own statement.

XIV.

No case in this Court has held the appraisers' action to control *rates* of duty. It is not known that the Government have ever before attempted to exclude from the judiciary a question of classification. The case at bar is distinguished from any case hitherto presented here in that the rate of duty being at issue, has not been tested on its merits because of an alleged appraisement.

Plaintiffs claim the true duty to be 18 cents per pound and 35% *ad valorem*, while the Government has exacted 24 cents per pound, 35% *ad valorem*, and 20% on both.

The statute classified worsted yarns valued under 60 cents a pound at rate of 18 cents per pound duty ; and on worsted yarns valued over 60 and under 80 cents per pound 24 cents per pound duty, both also to pay 35% *ad valorem.*

Plaintiffs claimed to pay 18 cents per pound only and 35 per cent. *ad valorem.*

It is submitted as not within the power of Congress to depute the final CLASSIFICATION *of dutiable merchandise to any subordinate official.* The *rate* of duty must be stated by Congress, and applied in accordance with the facts in each case. The application may be a matter of law, a matter of fact, or a matter of mixed law and fact.

It is primarily applied by the Executive Department through the machinery for revenue purposes. Whether it be erroneously applied or not may be determined by the judiciary in any proper case.

A common law action against the proper official as the result of involuntary payments or payments under mistake invokes the judicial power. The prosecution of such an action is a constitutional right exempt from Congressional prohibition.

The unintentional legislative interference with this right in 1839, was loosely sustained in this Court by one deciding vote, and then only on the ground that assumpsit was not the proper *form* of action ; but the opinions denoted that the action might lie in another form. That Congress could or did totally deprive the plaintiff of any right of action in *any* form *Cary vs. Curtis,* did *not* decide ; and the minority opinions stoutly declare that actions against collectors are founded upon the illegality of the transaction, which may not constitutionally be withdrawn from the judicial power, otherwise Congress could leave the power of interpreting laws to a functionary whose judgment is final (STORY, J.), and executive officers in the performance of their ministerial duties might "disregard and trample on the rights of the citizen without indemnity, (3 How., 266).

In the case at bar there is neither principle nor authority for the proposition that Congress has deputed or may depute to executive officers its prerogative of prescribing fixed *rates* of duty.

XV.

***Actions at law of this character, founded on the illegality of the transaction, existed at common law prior to the constitution;* and are therefore guaranteed under the Seventh Amendment, which preserves the right of trial by jury in all " suits at common law where the value in controversy shall exceed twenty dollars."**

Lord MANSFIELD (K. B., 1774) sustained the right of action against a customs officer of the crown for alleged illegal duties. The duties had not been paid over to the crown by the officer who collected them, and he was made the defendant for the purpose of trying the right to impose such duties, precisely as U. S. Collectors are by statute permitted to be made defendants even after paying the moneys into the public treasury, provided statutory notices of protest are given him.

The crown officer had exacted 4½% tax on certain Grenada sugar exports under authority of certain letters patent of the King dated in 1764, and subsequent proceedings thereunder. The plaintiffs claimed that in 1763 the King had by his proclamation commissioned the Governor to call an assembly to enact laws under which the colonial assembly only should impose such duties, unless Parliament itself should impose them; and that as the tax in question was unwarranted either by such assembly or by Parliament the exaction was unlawful and was recoverable at common law.

This view of the law being sustained, the plaintiff recovered.

Hall vs. Campbell, Cowper, 205.

See also: *Stevenson v. Mortimer, 2 Cowp., 805; Champlin v. Bullman, Parker's Rep., 198; Snowdon v. Davis, 1 Taunt., 359; Irving v. Wilson, 4 Term. R., 485; Buller v. Harrison, Cowp., 565; Elliott v. Swartwout, 10 Peters, 157;* and this common law has prevailed in State Courts in actions against United States officials. *Ripley v. Gelston, 9 Johns., 201; Clinton v. Strong, Ib., 370.*

The common law right to sue a collector and to test the legality of his exactions in a common law action has never been held to have been impaired except by the collector's statutory obligation to pay his collections daily into the treasury, and not to withhold them because of notices disputing their legality. When such notices, however, are given, the Government expressly consents that the collector shall be amenable in a proper case to the judicial power. The right to sue accorded under certain preliminary statutory conditions creates the status of consent on the part of the Government that the defendant for all purposes of the suit may be regarded as retaining the money in his hands after due protest.

He is the recipient of the plaintiff's money, paid to him under coercion. The plaintiff seeks to prove the payment under restraint—the illegality of the transaction, or the mistake of fact or of law, as the case may be; and the judicial power determines whether the exaction was the result of compliance with all the conditions necessary to warrant the assessment, or whether the plaintiff is right in contesting it.

Congress has expressly reserved to the Courts the exercise of this judicial power, which, indeed, could not constitutionally be withheld. In the exercise of this power the Courts proceed according to the course of the common law, to determine the issues as if between individual parties to the suit. That is, they proceed according to " due process of law," which generally implies regular allegations, an opportunity to answer, and a trial according to an established course of judicial procedure. It is not the *title* to the merchandise that is in question in such an action of assumpsit ; it is the *legality* of the transaction.

That Congress may prescribe summary methods by which executive officers may dispose of imported merchandise for revenue purposes, and convey a good *title* to merchandise so disposed of, need not be questioned. Such a case was substantially presented here in Irving's Lessee vs. H. L. & I. Co., 18 How., 274, where the Court held that the title conveyed under a summary distress warrant against a public debtor (Collector Swartwout) was in accord with a practice from very ancient times, and no intrusion on the Constitution as against due process of law.

If such a warrant, however, was illegally issued or called for the payment of unwarrantable sums, and such moneys were paid under coercion to procure property about to be sold under it, is there any doubt that the *officer* executing the warrant and coercing the payment would, after due notice and tender, be amenable to the judicial department in a suit at law ; or that in such case his warrant would be subject to the ordinary judicial tests and exemptions ?

The case of Irving's lessee affected only the *title* to specific property, and has no relation to the rights of a plaintiff in an action of assumpsit against a Government officer whom the Government consents may be sued for his acts. The same observation also applies to the case of Springer vs. U. S., 102 U. S. R., 594, which concerned the *title* of the *res*, and not the *topic* under consideration here.

Prior to the Revised Statutes and after the consent given by the Government in Sec. 14, of the Act of June 30, 1864 (13 Stat., 214), no case had imposed limitations upon the legitimate exercise of judicial power in these actions of assumpsit against the collectors. The expressed consent of the Government in Secs. 3011, 2931, 2932 R. S., confirmed in Secs. 14, 21, 26, Act of June 22, 1874, that notwithstanding defendant's daily payments into the Treasury he is amenable to an action in the nature of an action at law triable by jury, not only waives the privilege of exemption from suit which belongs to a sovereign, but necessarily relegates to the Courts the *legality* of the proceedings on which the payment in question was based, and imposes on the judicial department the exposition in a proper suit of *every essential fact* on which such legality depends. "*Exactions of whatever character*" are defined (Sec. 2932), as subjected to the judicial cognizance.

In the case at bar one issue is the RATE of duty; and that issue, as this Court has expressly declared is "open to review in an action at law" (110 U. S., 106). That issue the Court below refused to try. Indeed by its rulings there remained nothing for the jury to pass upon except as to whether the members of this "special tribunal" were satisfied with themselves, their own acts and conclusions; and as they testified they were satisfied with themselves there could be but one verdict.

XVI.

Courts uniformly have reviewed the REGULARITY OF PROCEDURE *on the part of appraisers.* The Court below withheld from the jury the enquiry as to whether the appraisers complied with the essential legal details prescribed for the fulfillment of their office. It refused to instruct them that the examination of samples did not dispense with the examination of designated original packages (fols. 80–79). It refused the jury an opportunity to test the alleged "fair samples" (fols. 49, 33). If, upon the conflict of testimony as to whether the merchant appraiser did or did not actually inspect any original packages (and the plaintiffs insisted that he did not, folios 61, 32, 33), the jury thought Mr. Read did *not* see the original packages, nevertheless, under the Court's instructions, they must necessarily find for the defendant if Mr. Read saw samples "fairly and sufficiently showing the kind, quality and character" of the goods (Rec., p. 41, 37, 35, 36). Its charge reads (fol. 70): "Did the appraisers do what was *equivalent to an examination* of these goods?"

That *some* samples were before the appraisers was clear. The defendants' witnesses testified five or six samples were taken by the Government from *three* of the packages (fol. 50) in the absence of the plaintiff, and that the goods "were not all alike." That they differed in *value* is certified by the appraisers themselves in reporting the value of three cases as respectively 5.70 marks, 6.30 marks and 6.00 marks per kilogramme (Record, page 13).

That the goods and their samples were the same in "*character*" was under exception permitted to be testified to for defendant, while the actual "character and value" of the goods themselves were excluded from the jury; and the "identical samples" themselves shut out (fol. 49). Thus the jury could not reasonably conclude otherwise than that the samples the Government appraisers saw fit to be satisfied to act upon became the "equivalent" of the goods themselves; and having inspected such samples, although no original packages, the conditions of appraisements stated by the Court were adequately fulfilled and plaintiffs necessarily defeated.

The examination required to be made by appraisers of the goods specified in the invoice under appraisement is prescribed by statute and in further detail by regulations where not inconsistent with the statute having the force of law as directory upon the appraisers.

The "special tribunal" is to "reappraise the merchandise in substantially the same manner as is pursued on original appraisment" (Secretary's Order, Record, p. 61): "The law of reappraisement is precisely the same as that of original appraisement."

By R. S., Sec. 2899, "no merchandise liable to be inspected or appraised shall be delivered" to the importer "until the same has been inspected or appraised." * * * "The collector shall designate on the invoice at least one package * * * and a greater number should he or either of the appraisers deem it necessary * * * to be *opened*, *examined* and appraised, and shall order the package so designated to the public stores for examination" (R. S., Secs. 2901-2939).

(In the case at bar *three* packages out of an invoice of *five* packages were designated and sent to the public stores for examination, a not unusual thing when the goods are *not* all alike.) (See Examiner's Evidence, fol. 50.) "A thorough examination must then be made under the direction of the appraisers in connection with the specifications and description in the invoice, to ascertain whether the merchandise corresponds in quantity and description with the invoice, and whether the value declared on entry corresponds with the requirements of law" (Sec. 451, fol. 84).

The *opening and examining* of the original package is essential. "This examination can in no case be dispensed with." Art. 448, fol. 82. "Appraisers shall closely inspect the articles ordered for appraisement." Art. 1409. "Their examination embraces the quantity, value and condition of the goods, and upon their reports are based the classification and the allowance for deficiences in quantity and damage incurred on the voyage of importation." Art. 1408. (Rec. p. 59.) Art. 452. (*Ib.* p. 43.) For upon this inspection the inspection of every package in the entire invoice may become necessary. If the appraiser inspects only a sample selected by some third person (*e. g.* the examiner, Fisher) he neglects his first function, and, it may be, certifies to values of something different—say a more valuable quality—than the bulk of the package specified in the invoice. The physical inspection by the merchant appraiser of at least all the packages designated by the Collector for that purpose is no idle ceremony, but an essential if not jurisdictional performance, without which the alleged appraisement was fatally irregular. The learned counsel for the Collector appreciated this so highly as to procure twice the re-opening of the case to the prejudice of plaintiffs ;—a procedure that might have proved valueless to the defendant, however, had not the charge of the Court to the jury permitted the latter to substitute an "equivalent" (fol. 70) for this inspection. So that if the jury arrived at the conclusion that Mr. Read did *not* inspect the packages, or did not fairly inspect them, they were at liberty to infer that as long as Mr. Read inspected some concealed samples that suited *him* the law was satisfied and plaintiff's case was disbarred.

Importers have hitherto been permitted by the Courts to make issue with the Government as to whether the appraisers made a full and fair examination of the goods. It is part of the truth as to whether the appraisers proceeded by "reasonable ways and means." This also is issuable. What constitute "reasonable ways and means," for a reappraising proceeding if not a question exclusively of fact under all the circumstances of any particular case is, at least, a mixed question of law and of fact.

As to the exceptions to the refusal of the Court to instruct the jury that seeing samples "did not dispense (fol. 42) with the necessity for an examination of the goods contained in at least one of the original cases or packages," and that the examination of samples exclusively (fol. 42) was irregular (fols. 80, 79, 75), and to the charge as made that all the law required was that the appraisers "should fairly make such full examination as *they deem sufficient* to enable them to decide the question submitted for their determination" (fols. 78, 75) plaintiffs respectfully submit that error has been shown to their grave prejudice and a new trial should be awarded.

Indeed under the instructions of the Court as given and refused there was substantially nothing submitted to the jury except Mr. Cadwalader's testimony that he made the appointment already in evidence as made by Mr. Jones. This was of little consequence to plaintiff, and as affecting their interests the Court on all other topics might as well have directed a verdict for the Government as to have put the case as it did. See the discussions on the exceptions to these instructions and refusals (*infra*).

XVII.

It is submitted that plaintiffs had a right to prove their doings by way of objection and protest against the appointment and action of Mr. Read; and this right is quite independent of the legal effects of their protests and action in this respect.

It has been said in cases at Circuit that when objections to any particular merchant appraiser have been relied upon, such objections must be interposed *promptly* and before the board gets fairly at work.

No case has been found denying, as was ruled in the case at bar, the right of an importer to urge the bias, prejudice or other disqualification of an appointee under Sec. 2930. The statute requires him to be a "discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question." Suppose any or all of these requiremets are disregarded? Then the tribunal was not properly organized, and was not legally competent to appraise. The Court below held that the appointment being confided to the Collector, if the latter acts "in good faith and honestly his action is not open to question by anybody" (fol. 64). Accordingly it excluded, as detailed in the preceding assignments of error, evidence of various circumstances and writings bearing upon such acts; going even so far as to shut out the ordinary tests of dishonesty or bad faith that might be exemplified by an exhibit of the private conferences between the defendant and his appointee after his alleged improper appointment had been exposed.

The rights of the Government in respect to the constitution and doings of the appraising tribunal in this respect can only be sustained on the unqualified right of the Collector to appoint an officer, and on the exemption of the Collector's "decision" in possible disregard of the statute, as well as the exemption of his appointee's decisions, however dependent on the Collector's wishes, from any future investigation.

Here is another illustration of the appointee's OFFICE and the unconstitutional source of the appointment thereto.

Whether the Collector in making the appointment did or did not follow the statute is submitted as an *issue* in a proper suit at law brought because of the Collector's decision in a case where it is alleged statutes have been disregarded. Evidence that the appointee was not "familiar" either with the "character" or "value" of the goods in question should have been received. Moreover, such evidence should have been compared with evidence of the *actual* "character" and "value" of the goods in question (and with identical samples thereof if produced) in order that whether the result be an issue of *fact* or of *law*, or a mixed issue of law and of fact, the judicial department of the Government shall in due course of law ascertain and determine whether the statutes have in truth been disregarded or obeyed. Any and every inquiry in this direction was rigidly excluded in the case at bar.

If the compliance or non-compliance by the executive with any Act of Congress by virtue whereof taxes are exacted, be not open to judicial inspection in a seasonable suit brought for that purpose, then the rights expressly reserved by U. S. R. S., sections 3011, 2931, and 2932, in accordance with which protests may be made against any and every decision of Collectors are shorn of the virtue which a long course of adjudications have established. The right of protest is nugatory without the consequent right to establish by proofs the particular illegalities stated in the protests. Besides, if it was competent for the Collector to narrate what he did about directing the Deputy Collector to appoint or approving his appointment of Mr. Read (folio 53), it was equally competent for the plaintiffs to show that this was done in the face of the plaintiff's letter, set out at folio 34, and repeatedly excluded from proof under due exceptions (folios 35, 39 and 59).

XVIII.

The defendant should not have been permitted to produce as testimony in his own behalf his letter of Aug. 30, 1886, addressed to Lewis Heyl (Rec., p. 27).

This letter was to a third person, never communicated to plaintiffs, and *after* the objectionable appointment of Mr. Read had been unlawfully made, by Deputy Collector Jones, on Aug. 28, 1886, as set forth at folio 29. The evidence was *res inter alios acta.*

This evidence followed the likewise objectionable narration by the defendant of his conversation with Mr. Jones, which intruded upon the integrity of a written instrument (*i. e.*, *the* appointment, fol. 29). That instrument formed an essential part of the warrant of assessment by virtue whereof the Collector exacted the tax sued for. The *papers* constituting this appraisement were the Collector's exclusive warrant to justify his liquidation. These papers were the invoice, the entry, the demand for reappraisement, the appointment and oath of merchant appraiser and the appraiser's report (fols. 28–32), upon which the consequent duty exacted became simply a matter of arithmetical calculation. These several writings were by regulation in accordance with statute or by statute required at the several steps in the progress of the assessment which they represent. In the absence of the papers themselves their contents must appear to justify the tax, if otherwise shown to be illegal. When by their contents the tax is shown to be infirm, the invalid paper may not be replaced by parol testimony which shall become a substitute for *the* record! Yet, this is what was done by permitting Mr. Cadwalader to narrate his talk with Mr. Jones and by submitting to the jury an issue thereby (fols. 53, 54) improperly created as to who made the appointment of Mr. Read (fols. 65, 77).

Would it not have been as competent to have substituted for the appraiser's report as made, the report of some other and possibly well qualified appraisers, as it was competent to substitute for *the* appraiser's warrant of appointment at folio 29, some other appointment, and one, too, resting exclusively in parol?

XIX.

In addition to and quite independent of the reasons already assigned for error in excluding the samples is the ground afforded by the evidence in chief of the defendant's witness Read. He said he saw two sets of samples ; and, under exception, was permitted to testify that between them " there was no perceptible difference, as far as we could perceive " (fol. 43).

It should require no argument to sustain the proposition that it was the essence and right of cross-examination to produce " in evidence the identical samples that were before Mr. Read," and to test his testimony by exhibiting those samples to the jury in connection with his answers. The right to a direct and legitimate cross-examination does not depend on judicial discretion. To refuse it is error.

That these samples afforded the plain and obvious cross-examination by which the statement of the witness on his examination in chief should be tested, is further illustrated by the fact that the five packages described on the invoice were " not all alike " (fol. 50), were invoiced at different prices (fol. 47), were described in different terms both upon the invoice and upon the appraiser's report (fol. 31). They were of different colors, different qualities, apparently of different threads, and by the appraisers' report themselves, variable in value from marks $5\frac{70}{100}$ per kilogramme to marks $6\frac{30}{100}$ per kilogramme (Record, page 13). It was important for the plaintiff to show the worthlessness of Mr. Read's testimony as to his recalled recollections (pp. 19, 20), contradicting his own testimony of the previous day (page 14), and it was vital that this worthlessness should be exposed by a test of the witness' statement that there was " no perceptible difference " between the samples ; and no test of this statement was simpler than the eyesight of twelve men. This test might have destroyed

Read's testimony and changed the verdict even under the charge as made. The prejudice against the plaintiffs by this exclusion will not be denied. The error shown by this exception (fol. 49) is respectfully urged as ground to reverse the judgment.

Nor does the apparent but unreal fairness of the charge at folio 70 diminish the prejudicial operation of this error. Had there been no question in the case except as to whether the samples were fair samples or unfair ones then the charge as to whether the samples were sufficiently indicative of the packages might have fulfilled the requirements of the case. But when the issue was whether the appraisers did in truth see the packages at all, the question as to fairness of samples was improperly taken as a substituted issue; and this was after the primary evidence by which the fairness of the samples could have been tested had been excluded; for the samples themselves and all evidence of their character and value and of the character and value of the goods themselves had been rigidly excluded.

XX.

The withdrawal of "irregularities" from the consideration of the jury as narrated in the 27th foregoing assignment of error operated with grave prejudice against the plaintiffs in error, and the language of the Court being specially excepted to, the judgment should on that account be reversed.

Instead of its being established as law that the *irregularities* of appraisers, although operating harshly and unjustly upon importers, are not matters for judicial "consideration at all," the Courts have uniformly inquired into these irregularities, and in numerous cases have sustained verdicts avoiding appraisements because of irregularities committed in conducting them.

Even prior to the Act of 1851, from which Sec. 2930 was constructed, many recoveries had been sustained at Circuit based on protests stating irregular or imperfect appraisements. A common claim, proof to sustain which has not been found to be denied in any reported case, has been that the appraising officers did "not fairly and faithfully examine" the goods. A case in this Court arose upon an importation made in 1850, where it had been protested that the merchant appraisers did "not fairly and faithfully examine" the goods. Evidence was received, and *held* properly so, that the appraisers did not examine the sugars, and saw only unfair samples. The conclusions of the appraisers that they were satisfied with their own examinations were not regarded as final, but the fairness of their actual examination was the subject of testimony, and the verdict of the jury against the regularity of the appraisement was sustained by this Court. It was here said that the appraisement in order to stand must be made "*in pursuance of law*" (Greely's Admr. vs. Burgess, 18 How., 413). So, if designated packages were not examined, or if the appraisement was made on unfair samples (in a case where samples might by law be relied upon), or other irregularity committed, or compliance with positive law evaded, the appraisement would not have been made *in pursuance of law*, and hence would afford no protection for the Collector.

In the case at bar this range of inquiry was in terms excluded in a variety of ways from the consideration of both Court and jury.

The apparent submission to the jury in one part of the charge as to what inspection of the original packages themselves was in fact made by the appraisers is nullified by the instructions and refusals excepted to, as, for instance, that errors committed by the appraisers in discharging their duties, "which are in the mere category of irregularities " (*i. e.*, deviations from statutory duty, if there were any such fairly shown by the evidence) are not for our consideration at all; nor are any of their errors unless of such a character as to make it " imperative on the *Court and jury* " to disregard their judgment (fol. 78); and *their* judgment could not be impaired if they made such examination as *they* deemed sufficient to enable *them* to decide (fols. 78 and 73).

Either the appraisers saw the original packages or they did not see them. If the jury concluded the original designated packages were not inspected, they had no opportunity to inquire whether fair samples were inspected, even if the inspection of samples only was a compliance with the law. The exclusions of evidence, and the rulings of the Court left nothing in that event open to the jury, except whether they believed the appraisers testified truly when they said they had satisfied themselves. It will not be denied that these rulings, if in any particular erroneous, operated potentially to the plaintiffs' prejudice, and require a new trial.

In this connection it is submitted that the Court below did not accurately state the law touching the appraiser's duty to inspect the designated packages. Sec. 2930 directs the " special tribunal " to appraise " agreeably to the foregoing provisions " of the Revised Statutes. These provisions require that the designated packages ordered by the Collector (*three in this invoice*) " to the public stores for examination," shall " be opened, examined, and appraised," and their contents compared with the invoice (Sec. 2901). The Treasury Regulations direct that " this examination can in no case be dispensed with." Art. 448, (fol. 82). A thorough examination of such packages must be made in connection with the invoice specifications, to verify them and to see whether the declared value " corresponds with the requirements of law." Art. 451, (f. 84).

This act of examination may be treated as a jurisdictional one, of initial essence to the validity of any appraisement and incapable of being performed constructively. It cannot exist exclusively by inference; nor has it any substitute. Its equivalent cannot be a matter of judgment or speculation. There must be an examination of the goods that were contained in at least one of the original invoice packages. Ystalifera Iron Co. v. Redfield 23 Fed. R. 650 This law the Court repeatedly refused to hold (fols. 80, 79, 75), and in a variety of ways gave instructions to the contrary, leaving the jury to speculate as to whether the appraisers did what was "equivalent to an examination," although the reasonable tests of any such equivalent had been carefully excluded.

The "foregoing provisions" of the Revised Statutes, as above mentioned, further direct every "person who shall act" as appraiser, to proceed "by all reasonable means in his or their power."

Was their official duty, in fact, performed, is a question that in fairness and by custom constitutes an issue in a proper case. For this issue the Court below has substituted the conclusions of the appraisers themselves as to whether they did what they chose to deem the "equivalent" for that official duty.

The errors discussed in the last few pages are particularized in the assignments of error Nos. 27, 28, 29, 31, 32, 33, 34, 35.

XXI.

The conversion by the Court of the silent act of Mr. Mustin in getting, at one time, before the appraisers (not when the samples on which they pretended to act were taken out, fol. 50), having with him a set of samples additional to the set taken out by the appraisers, into an admission, "in effect a declaration by Mr. Mustin," that "as you may find the values of these samples, so you may find the value of all the goods" (fol. 78), operated with grave prejudice to the plaintiffs.

Had this been advanced by way of an advocate's argument, it could have been met with appropriate instructions upon due request. Stated as a declaration from the bench of the law of the case, and excepted to, it has been assigned for error.

There is no principle of law that puts words into the bundle under a man's arm, although that man be an importer, and stand in the presence of customs officers. Moreover, the importer is rigidly excluded "from the rooms where" his goods are awaiting appraisement, and if he attempts to learn something about them, as, *e. g.*, to know if they are being fairly sampled or examined, the subordinates are forbidden "to hold communication" with him, he being an "interested person" (Art. 1410, fol. 114).

He has not attained possession of the imported package. As a matter of custom in cases of dispute, a variety of samples are generally produced by importers and witnesses before appraisers, with a view to a comparison between the goods thus produced and known about and the goods under inspection.

This, indeed, may fairly be inferred as the true intent—if any intent may be inferred—of the importer with a bundle, bent on questioning the exaggerated standard by which the value of his unseen importation has been judged. To instruct the jury that the "fair import" of such an act was a declaration, an admission of the plaintiff that *he* was producing samples of the packages in question, and hence furnished an "equivalent" for the official functions required by the statute, exhibits injustice and error.

XXII.

The right of the importer or his representative to be present when the actual inspection of his cases is being conducted by the appraisers, as well as when witnesses are examined, was denied by the Government at the time of the appraisement in question, and it is still in practice denied. The order of January 12th, 1887 (Rec., p. 64) was not then in force. The orders in force upon the plaintiffs excluded them (fol. 114) from attending upon the actual inspection of the packages (which, if made at all, was not pretended by the Government to have been made with plaintiffs' knowledge), and directed the statements of witnesses to " be taken in the presence of official persons only " (Rec., p. 61). The right of the importer to know what the " special tribunal " were going to do, and when they were going to do it, and to be on hand while the appraisement of his goods is proceeding, so that nothing substantial shall be done *ex parte*, was fairly before the Court. This right, denied as it was (fol. 80, 81) and ccompanied with an instruction to the jury that it was no part of the appraisers' duty to advise with the importer, aided to impress the jury with the legality and irretrievable character under the law and regulations of the determinations of this " special tribunal," and thus gravely prejudiced the plaintiffs (see 36th and 37th assignments of error).

The inherent vice in these cumulative errors runs under them all, and multiplies, illustrates and re-enforces to the prejudice of plaintiffs before the jury the one thought that this special tribunal is unimpeachable and infallible.

XXIII.

If, then, in any one of the important respects mentioned the rulings of the Court assigned for error be correct, it can only be because discretion and authority without question or limitation are reposed by law in this dignified "special tribunal"; that it exerts absolutely a portion of the attributes of the sovereign power vested in governmental authority; and that as such it is composed of OFFICERS amenable to the law and deriving their authority exclusively from the law.

As such officers they must be appointed exclusively by constitutional authority.

Unless the appraisers are such public functionaries the rulings of the Court below are erroneous in the sanctity and potency thrown by the Court around the acts of the Appraising Board.

In either aspect the proceedings of this Board as well as the judgment in this case must fall.

For the foregoing reasons all of the errors assigned are relied upon.

The judgment should be reversed.

HENRY EDWIN TREMAIN,
MASON W. TYLER,
ALEXANDER P. KETCHUM,
FRANK P. PRICHARD,
For Plaintiffs in Error.

123-369

123-369

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In the Supreme Court of the United States

OCTOBER TERM, 1887.

THOMAS J. MUSTIN, JOHN D. FORD, William W. Foulkrod, and William Syckelmore, jr., trading as Thomas J. Mustin & Co., plaintiffs in error,
vs.
JOHN CADWALADER, collector of customs for the district of Philadelphia.
No. 1002.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE DEFENDANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

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BRIEF FOR THE DEFENDANT.

STATEMENT.

In the plaintiffs' statement, on page 3 of their brief, the allegation, "one Charles Henry Jones, a deputy collector, appointed William F. Read," does not, as we understand it, conform to the evidence. Mr. Cadwalder, the collector, made the appointment (*vide* Rec., pp. 26 and 27). In his testimony, on page 27, after explaining the whole transaction, he states:

> I made the selection, and instructed Mr. Jones during my official vacation to make that appointment or to carry out my appointment—to notify Mr. Read. I recollect the case very distinctly.

Mr. Jones only gave the formal notice of the appointment, which had previously been made, to Mr. Read, signing his own name as deputy collector. Doubtless this fact misled the plaintiffs into the statement that Jones made the appointment.

On the fourth page of plaintiffs' brief another inadvertence or ambiguity of statement might lead the court to suppose that there was no examination of the goods by the reappraisers. The court left the question of fact, whether or not there was such an examination, to the jury, with instructions that if not made, their verdict should be for the plaintiff, as will be seen by the answer to the plaintiff's third point (Rec., p. 37). That the merchant appraiser did make the actual examination there was abundant evidence. (*Vide* testimony of Mr. Read (Rec., p. 31); also testimony of Mr. Heyl, the general appraiser, who acted with Mr. Read (Rec., pp. 24 and 25). Among other things, Mr. Heyl on cross-exanination said:

> Q. Do you testify as positively for Mr. Read as you do for yourself?—A. Yes, sir; the examination was made by both of us.

BRIEF OF ARGUMENT.

I.

The plaintiffs have assigned thirty-seven errors. Of these, from the first to the eleventh inclusive, and from the fourteenth to the twenty-first, are to the admission or rejection of evidence.

The second subdivision of the second section of the rules of this court provides:

> When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

It is submitted whether any of these assignments of error conform to the rule.

The remaining errors are to the charge of the court. With reference to assignments of this character the rule last quoted requires that—

> When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis,* whether it be instructions given or instructions refused.

All of the errors assigned are rather scant to comply with this rule, but Nos. 28, 30, 31, 33, 34, and 35 are especially deficient. In justice, it is due to the trial court that a substantial compliance with the rule be required. The twenty-eighth error well illustrates the effect of this disregard. It is as follows:

> It was error for the court to charge, as it did charge at folio 68, to the effect that if the members of the appraising tribunal did not see the goods at all

> until after they had signed a report exhibiting their conclusions, it did not matter "whether the examination was made before or after the report was made out and signed by the appraisers." (See exception at top of page 40, folio 78.)

The part of the charge referred, to when stated in full, is found on record, pp. 39 and 40, and is as follows:

> It is claimed by the counsel for the plaintiffs that this examination was not made until after the report of the appraisers was written out, and that if it was not made until afterwards, it amounts to nothing, and that, therefore, all their finding must fall to the ground; but, gentlemen, in any aspect of the case, this report was in the hands and under the control of the appraisers, and it might have been changed at any time that they saw proper to change it before it was delivered to the collector, so that, in the judgment of the court, it matters not whether the examination was made before or after the report was made out and signed by the appraisers, as it was in their possession, and as, presumably, they went there—and if their testimony be true they actually did so—for the purpose of making an examination to enable them to make up their final judgment upon the case, to be embodied, of course, in the written report which they were required to make to the collector.

The whole sentence as thus delivered by the court is different in its effect from the part quoted in the assignment. The same necessity for enforcement of the rule is illustrated in the thirty-first and thirty-second assignments, which are (page 18, of plaintiffs' brief):

> 31st. It was error for the court to refuse to charge that for the validity of the appraisement the merchant appraiser and general appraiser should exam-

> ine at least one of the cases or packages of the goods of the invoice under consideration that were designated by the collector and sent to the public stores for examination for the purpose of appraisement. (See folio 79.) Neither this instruction nor its substance was anywhere given in the charge, and what was said upon the subject of the necessity to examine those packages was qualified by the alternative issue submitted in the charge as to whether samples were not examined to the *satisfaction of the appraisers*, and as a substitute for the statutory examination of the packages themselves.
>
> 32d. It was an error for the court to refuse to charge, as it did refuse (folio 79), that for the validity of the reappraisement it was necessary that the merchant appraiser, as well as the general appraiser, should see and examine at least one of the original cases or packages from the invoice.

The court did charge in answer to plaintiffs' third point (which referred to the two preceding ones), as to the necessity of an actual personal examination by both merchant and general appraiser, as follows (Rec., p. 37):

> 3d point. That if the jury find that either the merchant appraiser or the general appraiser did not make such an examination of the goods, they must find a verdict for the plaintiffs for the full amount claimed, with interest.
>
> Answer. That point is affirmed.

II.

The first six propositions discussed in the plaintiffs' brief are intended to establish that the board of appraisement was not a lawfully constituted board, because the merchant appraiser was not appointed by the President or the Secretary of the Treasury.

Section 2930, Revised Statutes, provides:

> If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed the true value, and the duties shall be levied thereon accordingly.

The ground is taken that the provisions of the section quoted, which empowers the collector to "select one discreet and experienced merchant familiar with the character and value of the goods in question," is void, in that it violates the second section of the second article of the Constitution, which confers the power of appointing public officers upon the President, the heads of Departments, and the judges of the courts.

The fact that as early as 1823 this power was by law conferred on the collector and exercised by him; that the same power was repeated in 1842, and since that date has been in constant exercise, without question either by importers or by the legal profession, is strongly persuasive that the power thus conferred by law on the collector is not without the pale of the legislative functions of the Government, nor inhibited by the Constitution. The merchant appraiser is not such an officer as is contemplated in the second section of the second article. He is but an employé, the necessity for whose employment has its birth in the dissatisfaction of the importer with the action of the governmental officer. The importer has his option to call for his appointment or not. The duty of the appraiser is temporary, without continuity, and relates to a single transaction. The work to be done, from its very nature, must be done at the port of entry, sometimes in the most distant parts of the country, and will not admit of the delay necessarily incident to procuring an appointment from the President or the head of a Department. An employment of such a character does not constitute an office. The word "office" suggests to the inward consciousness of every one some continuity of duty, not occasional or temporary. In the case of *The United States* v. *Harwell* (6 Wall., 393), Justice Swayne declares:

> An office is a public station or employment conferred by the appointment of the Government. The term embraces the ideas of time, duration, emolument, and duties.

The case of *The United States* vs. *Germaine* (99 U. S., 511) refers to the case last cited with approval as to the principle quoted. The employment then under consideration was that of a civil surgeon, appointed by the Commissioner of Pensions, under section 477, Revised Statutes, whose duties were much more nearly continuous and of duration and permanency than are those of a merchant appraiser. The principles decided in the case, it is submitted, are conclusive of the case under consideration. Justice Miller, delivering the opinion, declares:

> If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case (referring to the case of *United States* vs. *Harwell*) the court said the term embraces the idea of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

The case of *United States* vs. *Maurice* (2 Brock., 103) recognizes the necessity of continuity and duration of duties as essential to the definition of an office.

III.

The seventh paragraph of plaintiffs' argument, which assumes to maintain that the action of the appraisers was void, because the merchant appraiser was not appointed in pursuance of the classification of the civil-service law and rules, is untenable. Considered in its legal bearing (if the facts sustain the position), that law should not be construed to render the act done by the appointee void. At most it should be regarded as an irregularity, which, while he acted as an officer *de facto*, his actions under an appointment in violation of the rules should be treated as those of an officer *de jure*. But the facts set forth in the record to which exception is taken do not show that, if an officer, he would be embraced in the classification. The rules of classification copied in the exception in the record, page 17, only apply to those who have an annual salary of over $900 and not more than $1,800. There was no evidence offered to show that the salary was annual, nor, if annual, that it exceeded $900 (per year).

IV.

Another position contended for by the plaintiffs is that the whole of section 2930, Revised Statutes, is unconstitutional and void, because of the alleged unconstitutional provision contained in it as to the appointment of a merchant appraiser. If this be true, the whole action of the board of appraisers would be void, from the notice to the report. If void, it would leave the appraisement made by the appraiser unaffected in any manner by the proceedings. The reappraisement fixed the same value and amount of duty that the appraiser did (plaintiffs' Brief, page 3, Rec., p. 13). The duty then collected by the defendant was the amount fixed by the appraiser, which, as the plaintiffs claim the reappraisement is a nullity, then stands unquestioned. This state of facts leaves the plaintiffs' argument that the law is unconstitutional *felo de se* as to their cause.

V.

Another proposition urged by the plaintiffs is that there was no special designation of Mr. Heyl, the general appraiser, to act. The law requires no special designation but only says the merchant appraiser is "to be associated with one of the general appraisers wherever practicable." Mr. Heyl was a general appraiser, and was associated with the merchant appraiser; so the law was fully complied with. Besides, he was notified to act in this case by letter, signed by the collector, as follows (Rec., p. 27):

> CUSTOM-HOUSE, PHILADELPHIA, PA.,
> *Collector's Office, August* 30, 1886.
>
> LEWIS HEYL, Esq.,
> *United States General Appraiser:*
>
> DEAR SIR: The merchant appraisement of a lot of worsted yarn by Messrs. T. J. Mustin & Co., per *Werra*, intended to be held to-day, will be held to-morrow, at 11 a. m., with Mr. W. F. Read as merchant appraiser.
>
> Respectfully,
> JOHN CADWALADER,
> *Collector.*

VI.

The complaint that the court erred in not submitting to the jury the facts whether or not there was a personal examination by the appraisers is not well founded. The third point of the plaintiffs on this subject was affirmed by the court without qualification (Rec., p. 37) as follows:

> 3d. If the jury find that either the merchant appraiser or the general appraiser did not make such an examination of the goods, they must find a verdict for the plaintiff for the full amount claimed, with interest.
>
> That point is affirmed.

The same thought is enforced in the general charge (Rec., p. 34) in the following language:

> In this case three packages out of five were taken to the public store-houses, to be there examined by the appraisers. The law made it their duty to examine and inspect one of these packages. Now, was such an examination made? If it was made, then, according to the decision of the Supreme Court, the appraisers failed to observe a fundamental principle of the law, and their finding would not be binding. It would not be final and decisive; it would, indeed, be no settlement at all.

VII.

The proposition that the plaintiffs were not permitted to appear or be heard before the board is without foundation in the facts of the case. The testimony of Mr. Hempstead (Rec., pp. 10 and 11), shows that he, a custom-house broker, and in this transaction the agent of the plaintiffs, was permitted to appear. He says, "I appeared before the board on August 30, and on August 31, in respect to this importation." Mr. Mustin, one of the plaintiffs, was also present and participated, and had a full opportunity to examine the samples, and presented some samples himself, as appears from the testimony of the merchant appraiser (Rec., pp. 22, 23, and 24), commencing with:

> Q. Did Mr. Mustin say anything about what cases his samples were brought from?—A. Mr. Mustin said a great many things, but I can not remember what he did say.

VIII.

The ground assumed in the plaintiffs' argument that the court held that the appraisement was conclusive of the rate is not sustained by the record. The question of rate was not in dispute, nor in any way raised in the court below. The whole instruction given by the court, rightly understood, was with reference to the finality of the reappraisement as to value. The fact that the rate may be dependent upon value as a means of determination does not justify the incorporation into the clause of the statute "and the appraisement thus determined shall be final and be deemed to be the true value," the exception which is substantially sought to be introduced therein by the plaintiffs, "except when the rate shall be determinable from the value." To insert such an exception in the act would be legislation and not construction. If, after the value is fixed, the collector should apply an erroneous rate, that would be a wrong that would be subject to review; but in the absence of such an error the plaintiffs have no cause of complaint as to rate. That the determination of the appraisers or reappraisers is final as to value is firmly established by the cases of *Hilton* vs. *Merritt* (110 U. S., 97); *Hertz* vs. *Maxwell* (3 Blatch., 137); *Belcher* vs. *Linn* (24 How., 508).

G. A. JENKS,
Solicitor-General.

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123-369

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1002.

THOMAS J. MUSTIN, JOHN D. FORD, WILLIAM W. FOULKROD, AND WILLIAM SYCKELMORE, JUNIOR, TRADING AS THOMAS J. MUSTIN & COMPANY, PLAINTIFFS IN ERROR.

against

JOHN CADWALADER, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF PHILADELPHIA, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFFS IN ERROR

TREMAIN & TYLER,
ALEXANDER P. KETCHUM,
FRANK P. PRICHARD,
For Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

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against

JOHN CADWALADER, COLLECTOR OF CUSTOMS, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

I.

A. There was neither "inadvertence" nor "ambiguity" in the statements made at the outset of plaintiffs' argument and sustained by the references given from the record.

Thus: There was but *one appointment* of merchant appraiser. That appointment was not made, except when made in compliance with the Treasury regulations, which required it to be in the following form (Record, pp. 29, 91):

"Form No. 104. Appointment of merchant appraiser. Custom-house ——, collector's office, ——, 18—. Sir: You are hereby appointed to appraise, etc., etc. * * * Before entering upon the duty indicated in the above appointment you will please call at this office to take the requisite oath. Very respectfully, —— ——, collector, to —— ——, merchant." (Record, p. 47.)

This form was followed in this case. (See Record, p. 12.) This form was filled out for Wm. F. Read, was addressed to him, and was subscribed by "Chas. Henry Jones, special deputy collector." This paper so authenticated constituted the exclusive warrant of authority possessed by the merchant appraiser. Unless a paper in this form had existed there could have been no statutory reappraisement.

True the defendant was permitted to testify in contravention of this paper, but to the admission of this testimony special exceptions were taken (argument on which is elsewhere made), and even if the evidence may be considered the fact remains as originally stated, that *the one appointment* upon which the assessment of duty was proceeded was that essential link in the assessment papers signed by Jones.

It is not the influences controlling an appointment, but the recorded appointment itself that fortifies the statement respectfully insisted upon that Jones "appointed" Read.

B. It is objected by point I of the learned Solicitor General that some of the assignments of error do not conform to the rules of this Court.

The plaintiffs' assignments of error were carefully framed, so as to state in each number, as briefly as possible, aided by *quotations from the record*, as much thereof as was essential to point the attention of the Court to the exact item in which that particular error culminated. It is submitted that this has been successfully accomplished in conformity with the rules.

The "full substance" of the evidence admitted or rejected, "upon which error is specifically assigned, is set forth in each one of plaintiffs' assignments of error.

The objectionable language of the court below and the precise instructions refused, as relied upon in each assignment of error, are also appropriately detailed. The rules were not designed to save the Court the necessary labor of referring to the record, and the criticism of the learned Solicitor General encourages unnecessary redundancy.

The gravity of the main questions to be decided, however, requires that even at the expense of redundancy, if not of patience, all technical criticisms of pleadings be eliminated from the case; hence the assignments of error are, without change, restated in this brief (*infra*), together with amplified extracts from the record appended at the foot of the assignments, against which the criticism has been specially directed. As to the instructions given or refused, the assignments heretofore filed, by quotation, "set out the part referred to *totidem verbis*" in each instance. *See also* RESTATEMENT OF ASSIGNMENTS OF ERROR (with amplified extracts from the Record) *appended at the end of this brief.*

C. Again, instead of "inadvertence" or "ambiguity" plaintiffs' statement at the opening of their argument was intended to direct the attention of the Court to the possibility that there was no physical inspection of the original packages of the goods; that there was a controversy of fact upon that issue, and that in submitting that issue to the jury the court below expressly and repeatedly refused to instruct the jury that such physical inspection was absolutely essential and could not be dispensed with by the examination of samples, even though the samples were fair ones.

Thus it results that, if in the conclusions of the jury—upon the controversy (stated at Record, folio 61) as to whether Mr. Read inspected the original packages—either one of the merchant appraisers did *not* see the packages it could make no difference with the verdict of the jury. Under the case as submitted the circumstance of actual inspection of original packages could not affect the verdict, but was eliminated from the issues. The plaintiffs were deprived of any benefit from testimony upon which a juror might conclude that there had not been an actual inspection.

It was because the language used by the court below might lead an appellate court away from the precise contentions of the plaintiffs that the latter repeatedly insisted, but without avail, that the court should declare that the reappraising officers must see and examine at least one of the original packages, and that for these packages samples, although fair samples, could not be substituted.

In no part of the case did the court below charge or make a ruling which did not permit the examination of samples to be accepted as a substitute for the examination of the original packages in case the jury saw fit to determine that those samples represented these packages, or that the original packages were never, in fact, inspected.

The quotation at the end of point I of the defendant's brief, reiterated in its point VI, referring to the third proposition submitted to the court below before the charge, and in connection with which is quoted the answer of the court thereto—"that point is affirmed"—wholly fails to call attention in this Court to the fact shown by the record that this affirmation of plaintiffs' third proposition was upon the basis of the affirmation of two preceding propositions of the plaintiffs' with the objectionable qualifications inserted in them by the court to the effect that "if the appraisers had before them samples of the goods * * * fairly and sufficiently showing the kind, quality, and character of the goods contained in these packages, the act of Congress was substantially complied with, and the examination directed by it in effect made; that is substantially what I have already said."

This qualified examination, and not some other one, is *the* examination, or, as the court puts it, "*such* an examination of the goods" as would justify a verdict for the plaintiffs.

To preclude any possible misconception of plaintiffs' contentions and of the action of the court below upon them, the record shows the attention of the court below to have been again specially called to this subject where "plaintiffs' counsel requested the court to instruct the jury as follows:

> "That to make their appraisement valid it was necessary that the merchant appraiser, as well as the general appraiser, should examine at least one of the cases or packages of the goods of the invoice under consideration that were designated by the collector and sent to the public stores for examination for the purpose of the appraisement of the goods.
>
> "To the refusal of the court to instruct in the language of this request plaintiffs' counsel duly excepted." (Fol. 79.)

The mind of the court upon this subject in connection with its rulings is obvious through the following extracts from its charge (Rec., p. 34):

> "In this case three packages out of five were taken to the public store-house to be there examined by the appraisers. The law made it their duty to examine and inspect one of those packages. Now, was such an examination made?" * * * "Did they do what was equivalent to an examination of those goods? There is evidence, and it is uncontradicted, that the appraisers had samples before them." * * * "Now, gentlemen, if those samples are identified specifically as parts of the contents of these packages which the appraisers were required to examine, that they sufficiently indicated the kind, quality, and character of the goods contained in these packages, and that they were before the appraisers, and their judgment and finding, based upon an examination of these samples, there was such a substantial compliance with the directions of the statute as would make their judgment unassailable upon the ground that they had not discharged the duty which the law required of them."
> * * * "If, therefore, upon all the evidence upon this subject, you are satisfied that these samples fairly and sufficiently indicated the quality and character of the goods contained in the packages, then an *examination of them* and an identification of them is a sufficient compliance with the act of Congress." * * * "To what extent they made the examination we have no evidence." (Rec., fol. 73.)

Indeed, no examination whatever of the original packages was necessary, according to the rulings of the court, for the court said that "if the appraisers had before them samples" * * * "the act of Congress was substantially complied with and the examination directed by it in effect made." (Fol. 75.)

The rulings of the court below in this regard were directly at variance with those of other circuits, notably those of New York and Boston, as appear by the cases of *Ystalifero* vs. *Redfield,* 23 *Fed. R.*, 650*;* and *Burgess* vs. *Converse,* 2 *Curt. C. C.*, 221.

In the last-mentioned case the examination of the packages was held necessary to a just valuation, and to " enable the appraisers to know the quality and condition of the whole invoice." Any other mode of proceeding would be " unsafe in all cases for the Government, as the want of such an examination gives opportunity for frauds, and in many cases when the quality of the goods was not uniform it would be unsafe for the importer as well as the Government." If this requirement has not been obeyed " the examination and appraisement have not been in conformity with the law." (*Id.*, p. 222.) Nor are the appraisers to judge " how far they ought to examine," because the law " has prescribed a rule " to which the appraisers must conform. An examination of samples not selected by the appraisers themselves (p. 222) " assumes what the appraisers have no right to assume, that the samples not selected by themselves fairly represent the whole invoice." The claim in that case, as in this, was that the appraisers did not fairly and faithfully examine the goods.

The great variance between these views and those of the court below in the case at bar is further emphasized by the exceptions specially taken by the plaintiffs to the refusals of the court to change its charge as requested. The record is very clear in this connection at folios 79 and 80, where, in addition to what has been before quoted, occur the following requests for instructions, viz :

" That to make the reappraisement valid it was necessary that the merchant appraiser, as well as the general appraiser, should see and examine at least one of the original cases or packages of the goods of the invoice under consideration.

"To the refusal of the court to instruct in the language of this request plaintiff's counsel duly excepted." (Rec., p. 40.)

When the court sought to qualify these propositions or to modify them plaintiffs' counsel duly excepted, and when the court did tell the jury—

> "That if the appraisers had before them samples of the goods taken from three of the packages comprised in the importation—that is the evidence of Mr. Fisher, that the samples were taken from three—and designated by the collector on the invoice for examination, and fairly and sufficiently showing the kind, quality, and character of the goods contained in these packages, the act of Congress was substantially complied with and the examination directed by it in effect made. That is substantially what I have already said."

This language was pointedly excepted to.

It was because this *was* said and was made the leading inspiration of the charge and here again re-emphasized that "to the qualification or modification as above answered and stated by the court plaintiffs' counsel duly excepted, and the exception was allowed by the court." (Rec., p. 41.)

Plaintiffs' counsel further requested the court to charge as follows:

> "That *the examination of samples*, even though they may have been fair samples, *did not dispense with the necessity for an examination of the goods contained in at least one of the original cases or packages.*"

To the refusal of the court to charge as so requested plaintiffs' counsel duly excepted, and the exception was allowed by the court.

Plaintiffs' counsel also requested the court to charge as follows:

"If the jury find that samples *only* were examined by either the merchant appraiser or the general appraiser they must find a verdict for the plaintiffs for the full amount of claim, with interest."

To the refusal of the court to charge as so requested plaintiffs' counsel duly excepted, and the exception was allowed by the court.

In the face of this record (p. 41) it is obvious that the learned Solicitor General in constructing his point I. has failed to grasp the scope and the details of the rulings excepted to; otherwise he would not have concluded his point by detaching from the record that which the context does not justify, and thereupon argue to this Court that the court below actually charged the jury what it expressly refused to charge.

In the face of the issues brought here by the exceptions exhibited in this record it is idle, through an imperfect statement of the record, to attempt an escape from the fundamental questions which the case presents.

II.

In point II of the defendant there appears (1) a mistaken inference respecting the act of 1823 and subsequent acts regarding reappraisements; and (2) a misunderstanding and misapplication of authorities respecting "continuity and duration of duties as essential to the definition of an office."

(1.) The defendant in his brief states: "As early as 1823 this power (of appointment by collector) was by law conferred on the collector and exercised by him." This statement as applied to reappraisements is misleading. Sec. 18 of act 1823 provided for an arbitration, the importer at his own expense selecting two members of a board of four. (See particulars of this statute on page 75 of plaintiff's argument.) The board was a genuine arbitration tribunal. In 1842 all this was changed. The importer no longer had any voice in the selection of a board of two members. All power of appointment was then vested in the collector—a power renewed in 1851, with the additional proviso that one of the general appraisers might be substituted for one of the merchants'.

The fact that no reported case can be found arising under these enactments or prior to the Revised Statutes and anti-moiety act, June 22, 1874, is no answer to the constitutional objection against the method of appointment. In the language of the Attorney General: "It more concerns us to ascertain what is the constitutional rule than to learn whether that rule has always been observed. Nineteen violations of the Constitution do not justify a twentieth."

13 *Opin. Att'y Gen'l*, 518: *Plaintiffs' Argument*, p. 32.

The fact is that until after 1874 reappraisements never assumed serious proportions. Thus at the port of New York, where reappraisements chiefly occur, there were in 1873 about one hundred reappraisements, while in 1876 they numbered about one thousand and now number between three and four thousand per annum.

One of the causes of this increase of reappraisements disproportionate to the increase of commerce is found in the refusal on the part of the Government to proceed for the condemnation of goods for alleged undervaluation, and thereby subject the question of value to judicial determination. Two considerations have prompted this policy; one is that since the act of June 22, 1874, (18 Stat., 188), the burden of proof has been thrown upon the Government to establish fraudulent intent to undervalue affirmatively; whereas theretofore the statute imposed upon the claimant in proceedings *in rem* the burden of establishing his own valuation. For this reason the Government seldom if ever proceeds for undervaluation. The other consideration is that results equivalent to condemnation can be and are arbitrarily accomplished through the reappraisement tribunal. The collector now appoints the merchant appraiser, and yet the collector is at the same time the final deciding officer when the merchant appraiser and the general appraiser disagree. Thus, if the collector desires a high valuation fixed he can appoint a merchant who he knows will fix a high valuation.

The disagreement of the general appraiser would not defeat the collector's purpose. He has only to sustain his appointee, the merchant appraiser. This situation is by no means fanciful. The case called immediately preceding this one, of Oelbermann No. 47, this docket, furnishes one illustration; and in the preliminary arrangements canvassed between Mr. Read and the defendant before the appointment, as testified to by the latter, in the case at bar all the possibilities are exhibited (fol. 56).

(2.) As to the "continuity and duration of duties as essential to the definition of an office," if the argument of the learned Solicitor General is sound, no station is an office the duties of which are not continuous to a time fixed by law or chronologically designated in the warrant of appointment.

Surely the authorities cited do not warrant the proposition that no station is an office unless held for a *specified* time. Scores of offices are held exclusively subject to termination at the will of the appointing power; others, although nominally for a fixed term, as four years, are equally at its will. Other offices are dependent in duration upon the "subject-matter" over which they exert authority. Other officers, again, like customs inspectors, may or may not be actually employed, but are paid only for the days they render service. So also are merchant appraisers on reappraisement paid by the day according to the number of days they are actually engaged on the reappraisements. These days may extend, as they often do, through a period of months. Thus in New York an instance occurred where the same merchant was merchant appraiser, acting at one time on more than thirty invoices. It took more than six months to dispose of these invoices on reappraisement; and, of course, therefore, during this entire period the office of merchant appraiser was continuously held by the merchant referred to.

At the collector's option this officer could have been furnished with continuous engagements and innumerable invoices covering the collector's term of office. Thus "continuity and duration of duties" become the ordinary fulfillment of the statute.

Is it, then, accurate for the Solicitor General, at page 7 of his brief, to say that "the duty of the appraiser is temporary without continuity and relates to a single transaction?" Even so, for that single transaction the office and its functions are as grave and potential as though held for the life or good behavior of its incumbent. Moreover, there is nothing in the statute that restricts the appraiser to a single transaction. Standing appraisers may be appointed by the collector to whom all the invoices of a firm, of a day, of a month, or of a season shall be referred.

The disposition of the subject-matter determines the office, so that in fact and in law this office may exist and continue even for the purposes of a single transaction. Illustrations of such offices as this are given in point I of plaintiffs' argument.

There are many stations where duration out of tenure is not chronologically fixed. The time occupied is often mentioned as an incident of office; but has never been pronounced an essential characteristic, except in the sense that a service even in connection with a single subject-matter must require *some* time for its performance.

IT IS THE CHARGE OR DUTY OF THE POSITION, ITS FUNCTIONS, ITS ATTRIBUTES AND OBLIGATIONS AS DEFINED BY LAW, AND NOT BY CONTRACT OR BY PERSONAL DEPUTIZATION, AND FINALLY IT IS THE EFFECT OF THE DETERMINATIONS OF THE OCCUPANT OF THE STATION AND THEIR OPERATIONS UPON THE RIGHTS OF OTHERS, THAT CHARACTERIZE A STATION AS AN OFFICE AND ITS INCUMBENT AS AN OFFICER.

Every necessary step in the machinery of imposts is the act of a Government officer.

It requires no argument to show that if in *one* case Congress can depute a public function to be performed in particular places or upon particular subject-matters by the appointee of an unconstitutional subordinate, it can do so in many cases, or in all cases; and thus Congress might disperse the entire Federal machinery. It might distribute the various Governmental performances required here and there among the temporary servants or independent appointees of a host of irresponsible subordinates; and thus the whole scheme of a responsible constitutional source of appointment would speedily be eliminated from the system of our Federal administration.

(3.) The OFFICE of merchant appraiser as such is not only recognized by the highest officers in the Executive Department, but its governmental functions have been made the frequent subject of recent official and legislative consideration. The Honorable Secretary of the Treasury has placed the duties of these customs reappraisers, and the effect of their acts upon the rights of importers and in the administration of the laws, in comparison with the dignities and attributes of the highest grade of officers. He has also recommended Congress to provide for their appointment by the President and confirmation by the Senate, and that the special tribunal of reappraisers instead of consisting of *collector's* appointees shall consist of three such officers. Thus with reference to the port of New York, and without any neccessary change in existing laws, prescribing the duties of these reappraising officers, Mr. Manning recommends, in speaking of this special tribunal, as follows:

> "The board should consist of three instead of two, so as to prevent probability of disagreement as when the board consists of only two. The decision of this board should be final, so as to relieve the collector of the reappraising work which is now thrown upon him. I do not think that abadonment of the present plan of selecting a merchant to be a member of the reappraising board will work injustice to importers or consumers *or to the Government.* It will be

within the discretion of Congress to make the *tenure of office of the members of this board such as may be thought best.* They can be nominated by the President and confirmed by the Senate, as are justices of the Supreme Court and judges of all other Federal courts. Federal judges sitting in admiralty decide mixed questions of law and fact without the intervention of a jury, and I see no reason why *executive officers* may not, as *reappraisers, be intrusted with functions not more delicate or important.*"

See Special Rep. Sec'y Treas'y to Congress, dated Feb'y 16, 1886.

III.

The answer to the third point of the defendant is anticipated in seventh paragraph of plaintiff's argument, where it is shown that by the proofs the compensation exceeds the rate of $900 per annum, being "five dollars per diem." (Fol. 93.) The appointment runs for as long a time as the duties may endure, which may be one month or twenty months, according to the necessities of one investigation or of a number of investigations that may be appointed to be undertaken by this appointee. Of course this appointee is, as the learned Solicitor General for his purpose in this point concedes, an OFFICER *de facto,* if not *de jure. It is because he is an* OFFICER *de facto that the Constitution is infringed* as well as the civil service statute.

While the "irregularity" of his appointment may not in all cases be assailed collaterally, yet it may directly be questioned by a party whose property is to be taken by virtue of the warrant of an officer without *any* competent authority to act in the premises, and whose acts are, therefore, totally void as against the party entitled to call them directly in question. The appointee's qualifications are issuable—*i. e.,* he must have passed a civil service examination, be a citizen of the United States, and be "familiar with the character and value of the goods in question."

The court erred in not permitting these qualifications to be investigated.

IV.

Respecting the fourth point of the Solicitor General, that if the reappraisement be void for unconstitutionality of section 2930 R. S., the appraisement made by the previous appraiser would remain "unaffected in any way by the proceedings" (page 9, defendant's brief), it need only be said that such a declaration squarely decided by this Court would accomplish one of the purposes sought by plaintiff's writ of error. The small amount represented by the claim in this particular importation might well be sacrificed to secure the principle pronouncing the section 2930 unconstitutional, even though the prior appraisement would remain "unaffected."

In truth, however, it would not be "unaffected." There is nothing in the previous or first "appraisement" that is by the statute made "final and conclusive" against protests and suits at law. On the contrary, in the absence of section 2930, *all* appraisements and decisions based upon them are subject to suits at law to test their validity (R. S., secs. 2930, 3011). When duly made the subject of protest, in such suits the "character and value" of the goods would then unquestionably be open to judicial scrutiny. The exclusion of evidence touching such "character and value" would then be error, and the commission of that error in the court below would in that event reverse the judgment. Such evidence was excluded (fol. 33–39).

If the plaintiffs have attempted suicide by invoking the unconstitutionality of section 2930, they are content with the results and with the ready relief at hand inside as well as outside of their case. The defendant's third and fourth points seem to concede the unconstitutionality of section 2930.

V.

If the letter quoted in defendant's fifth point was not properly received in evidence the point falls. Its admission in evidence is assigned for error No. 16; and reasons to sustain the exception are indicated at page 95 of plaintiffs' main argument.

This letter was subsequent to the main fact about which the issue had been created, to wit, the appointment of the merchant appraiser. Plaintiffs' evidence (fol. 29, p. 12) shows that this was made on August 28, 1886. The defendant's letter of August 30th was *res inter alios acta,* and was inadmissible as *res gestæ.*

> Freeborn *v.* Smith, 2 Wall., 160; see also 19 Conn., 250.

VI.

The defendant's sixth point seems to belong to the defendant's first point, and is its reiteration. It has therefore been already responded to under No. I, on this reply brief.

VII.

The defendant's seventh point is based on a misapprehension of the proposition of the plaintiffs stated in the 36th assignment of error. That proposition is not, as stated by the learned Solicitor General in the first sentence of his Point VII, that "the plaintiffs were not permitted to appear or be heard before the board." The instruction referred in these words to the plaintiffs being "prevented from being *present at the examition of their goods* by the reappraisers." The *ceremony* of *hearing* the broker and Mr. Mustin did undoubtedly occur; only this and nothing more. But that the plaintiffs were on hand or had any opportunity to be on hand at any actual "*examination of their goods*" (if any such examination did occur) the Government has never in this case contended. Besides, such a contention would be against the facts. The Government witnesses testified that the *samples* relied upon by the appraisers were selected by a Mr. Fisher, an examiner, when Mr. Mustin "*was not present.*" (Fol. 50.) It will be observed the sampling was not done by the reappraisers. "Mr. Fisher produced samples and designated them as samples of the goods in question." (Rec., p. 22.) Neither the witness Heyl, nor Read, who claimed to have seen certain packages, pretended to testify that plaintiffs were present when they saw the goods. The reason *plaintiffs* could not have been and were *not present,* as shown by the record, *at any* "*examination of their goods,*" is precisely because such was the course of business under which the reappraisers were acting that plaintiffs were "prevented" from being present by official edict. Mr. Read testified, "I do not know of any means that Mr. Mustin had of being present." (Rec., p., 59.)

Moreover, the record shows the regulations "rigidly *exclude* unauthorized persons from the rooms where *goods* are awaiting or are *under examination.*" (Rec., p. 59.)

The right to be present and "to know that *his goods* are being examined, and to exhibit his goods, present them to the board for their examination, inspection, and determination, and *witness what they do,* so as to have an opportunity to call their attention to anything he desires" (according to the right declared by Judge Wheeler in language quoted at Rec., fol. 128) was the right covered by the plaintiff's rejected proposition.

The plaintiff's claim in this respect for the instruction which was refused, having been misapprehended and not even stated in defendant's Point VII, remains unanswered in that point or elsewhere in defendant's brief (see also p. 102, plaintiffs' main argument, and 36, assignment of error appended to this reply). Either the refusal to instruct, as requested, was error, or else plaintiffs had no such rights as Judge Wheeler describes.

VIII.

It is impossible to reconcile with the record the statement in defendant's Point VIII, that "the question of rate was not in dispute, nor in any way raised in the court below." (See def't's brief, page 12.) This statement antagonizes the details mentioned in Point XIV of plaintiffs' main argument, (p. 83.)

The record (which sustains Point XIV, as there cited), shows that upon the original entry plaintiffs claimed the true duty to be only 18 cents per pound and 35 per cent. ad valorem. The result of the Government's assessment was an exaction of 24 cents per pound, as well as 35 per cent. ad valorem, and a penal duty besides of 20 per cent. on the whole. This is detailed in Mr. Hempstead's testimony (record, page 10), in stating the plaintiffs' claim. The figures are given in the record. It was as between a *rate* assessed of 24 *cents* per pound, and the true *rate*, as claimed, *at* 18 *cents* per pound that there existed the dispute. That was and is *the* controversy, and, except the penal duty and 35 per cent. on the differences in the valuations, comprises the whole controversy. It is surely a "question of *rate*" which was "in dispute" in the court below.

For the learned Solicitor General to conclude Point VIII by contending the appraisers' valuations to be conclusive is, however, quite fair and in harmony with the Government contention below. This topic has therefore been fully anticipated and treated in plaintiffs' main "brief and argument" heretofore filed.

The defendant's closing reference to the case of *Belcher* vs. *Linn*, 24 *How.*, 508, justifies a further observation.

In that case there is a *written agreement of arbitration* between the importers and the Government, the former stipulating "*to abide by the appraisement of the board.*" The dispute over the value arose because the Government, and afterwards the reappraisers, had included in the foreign value an item to represent an assumed Cuban export duty which plaintiffs claimed they did not pay.

In a suit to recover the excess paid it was held that plaintiffs could not recover. This Court then examined two questions—(1), Was the additional value lawful? and (2), Was the testimony of the general appraiser, detailing the principle upon which he had raised the valuation, properly admitted?

This court answered both questions in the affirmative. (Why, then, should not Mr. Read have been permitted to tell about the values and how he arrived at values in the case at bar?) At page 522 this Court describes the re-apprising tribunal (which in that case were stipulated *arbitrators*) as OFFICERS, the exercise of whose "powers involves knowledge, judgment and discretion," and characterizes the board as a public officer or tribunal having power or jurisdiction delegated "over a subject-matter." The acts of such OFFICERS are binding, and certain classes of questions are settled by the decision made or the act done by such tribunal or officer, whether executive, legislative, or judicial, "unless an appeal or other revision is provided for by some appellate or supervisory tribunal."

The value of Belcher *vs.* Linn in its application to the case at bar is found in its judicial description of "special tribunals," which, in acting on any particular "subject-matter" with the potency delineated, are unreservedly characterized as OFFICERS; and officers, too, of grave dignity and extensive powers.

Is the OFFICE to be filled by the unrestrained will of Congress, or by constitutional methods only?

IX.

It is noteworthy that many of the exceptions assigned for error and covered by the plaintiffs' brief and argument have escaped any treatment whatever. in the Government brief. This may indicate that the learned Solicitor General found some of the rulings below, particularly interlocutory rulings, to be untenable. At all events it is noteworthy that an examination of the Government brief discloses no allusion to the questions raised under the exceptions presented by the plaintiffs' assignments of error Nos. 1, 2, 3, 7, 8, 9, 10, 11, 15, 17, 18, 19, 22, 23, 24, 27, 29, and some others.

The plaintiffs respectfully rely on all the errors assigned (*see Appendix*) and on the reasons given in the brief and argument first filed and in this reply brief. These papers are made full because of the necessary omission of an oral argument under the conditions upon which this case has been advanced.

Dated Washington, October 31st, 1887.

HENRY EDWIN TREMAIN,
ALEXANDER P. KETCHUM,
Of Counsel for Plaintiffs in Error.

APPENDIX.

THOMAS J. MUSTIN ET AL. *vs.* JOHN CADWALADER.

ASSIGNMENTS OF ERROR RESTATED WITH ADDITIONAL EXTRACTS FROM THE RECORD.

See pages 7 to 20 of plaintiff's main "brief and argument." The extracts added are indicated thus (*). Otherwise the following is a reprint:

Assignments of Error.

1. The Court erred in excluding from evidence the "formal protest against the action of the person designated by the collector to sit as a merchant appraiser in connection with the general appraiser," which protest was made in writing as soon as the plaintiffs or their representative knew who were proposing to act as appraisers (see exception at folios 27, 28, 34, 35, 39, 58, 59, Record, pages 11, 15, 17, 30, 31). This "formal protest" was made orally and in writing, the writing excluded being set forth at folio 34. The Court erred in declining to receive any testimony whatever as to what the plaintiffs or their representative did in this respect, and in declining to receive the plaintiffs' letter written to the defendant on August 30, 1886.

* This protest and letter was as follows:

"PHILADELPHIA, *Augnst* 30, 1886.—Hon. JOHN CADWALADER, *Coll. of Customs*, Philadelphia.—SIR: We would most respectfully protest against the appointment of Mr. William F. Read as merchant appraiser, and against his 'acting in that capacity in conjunction with General Appraiser Heyl in the case of reappraisement of certain worsted yarns imported by us, per S. S. Werra and P. R. R. from Bremen via N. Y., June 28th, 1886, claiming that the said William F. Read is not an importer of or dealer in the particular quality or kind of yarn in dispute, and that he is not acquainted with the foreign market values of the same, and that therefore his appointment is not in conformity with the customs regulations on this subject. See article 466, which provides that the person so selected shall be 'familiar with the character and value of the goods in question,' R. S., 2930. We therefore ask that the regulations may be complied with, and that some more suitable person be appointed to act in our case. Very resp'y yours, Thomas J. Mustin & Co."

Touching this paper the broker testified: "When I went before that board I entered a formal protest against the action of the person designated by the collector to sit as a merchant appraiser in connection with the general appraiser. I filed a paper which I then prepared as soon as it could be written;" with this paper was offered proof as to the value of the goods. (Record, p. 11.) Before the ruling was finally made excluding this paper the formal offer of testimony was tendered and ruled out under exception, as stated in the second assignment of error. There were two exceptions to the exclusion of this paper, the first one being in connection with the foregoing offer, but in a separate exception stated at the close of the opinion of the court, at page 17 of the record. The other exception was to the subsequent reexclusion of the paper when offered as a part of the cross-examination of the defendant, who had testified in answer to a juror that Mr. Mustin objected to the appointment of Mr. Read as soon as he (defendant) was authorized to give him any knowledge, and that he made the objection through this paper, which the defendant identified. The paper was then again offered and excluded. (See p. 30.)

2. The court erred in rejecting proofs tending to show that the general appraiser and merchant appraiser convened on August 30th, and upon plaintiffs objecting that Mr. William F. Read should not act as merchant appraiser, on the ground that he was not a "discreet and experienced merchant familiar with the character and value of the goods in question," the proceedings of the board were adjourned, and that the same board reconvened on August 30th and pro-

ceeded to conduct the appraisement against the importers' objections, and in the manner described at folios 32, 33, record, page 14; and that the said board reached its results by acting exclusively "on the samples and on the evidence submitted," not seeing the packages themselves (see folio 34 and the exceptions to the opinion at pp. 15–17).

*The exceptions upon which this assignment of error is based were taken to a ruling excluding testimony under the offer of testimony described in the record as follows:

On the first day that plaintiffs had any knowledge of who comprised the board their broker attended. Whereupon the plaintiffs "offered testimony tending to show that immediately, on August 30th, 1886, objection was made on behalf of the plaintiffs to William F. Read, acting as a merchant appraiser in this case, upon the ground that he was not a discreet and experienced merchant, familiar with the character and value of the goods in question, and also that that the proceedings were then adjourned in order that such a protest might be reduced to writing and filed with the collector; and also that subsequently, on August 31st, the board reconvened, composed of the same members, and proceeded to conduct the appraisement against the importers' objections and in the manner described by Mr. Read in his testimony," which testimony was as follows: Q. You acted on the samples alone, did you not? A. We acted on the samples and on the evidence submitted. Q. You did not see the packages yourself? A. No, sir. Q. You called two witnesses, did you not? A. There were two witnesses present; yes, sir. Q. Could you recognize the samples? A. I could not. (Record, p. 14.)

3. The court erred in refusing proof that the merchant appraiser Read was not "familiar with the character and value" of such goods as were in controversy (see exceptions at folios 33, 35, 38, 39, and 77). (See briefs filed in Oelberman *vs.* Merritt, No. 47.)

*In addition to a general exception to any testimony under the offer recited in the preceding assignment as an entirety, there was a separate exception taken to the disposition of each separate part of it as made by the court. This assignment of error relates to that part of the offer tendering proof that Mr. Read "was not a discreet and experienced merchant familiar with the character and value of the goods in question," which is the language of the offer stated in two places on page 14, and which is disposed of in the opinion of the court at folio 36, and its decision in accordance with such opinion at folio 39. In connection with this offer the question was put to the witness Read: "Q. Referring to the identical goods represented by the samples which were before you at that time were you familiar with the character and value of the goods as articles of importation from Berlin?" Testimony under this question and the offer was excluded under the exceptions.

4. The court erred in refusing proofs touching the "character and value" of the goods. (See same offer at folios 27, 33, and ruling excluding the same at folios 38 and 39.)

* The offer to which this assignment of error relates is stated in the record, at folio 33, in the following language: Plaintiffs proposed to show "What was the character and value of such goods," being goods identical with the articles of importation represented by the samples before the reappraisers. (See folio 33.) This is a renewal of the offer previously made as narrated in the record at page 11, where plaintiffs' counsel tendered "proof as to the value of the goods should be received." In its opinion the court said: "Can the valuation be assailed? I do not see how it can." (fol. 38).

5. The court erred (see folio 35) in ruling that William F. Read had any authority to act as appraiser in the way he did act (see rulings at folios 35 and 39 upon the offers, and also similar ruling at folios 52, 64 to 66, 76, 77, 81).

* The rulings of the court at the folios indicated to which this assignment of error relates follow the opinion of the court expressed in the following paragraph: "It is to be observed that the appointment of this appraiser has to be made by the collector. He and he alone is authorized to make the selection. * * * It was the business of the collector

alone to make this selection, and no one had any right to object to it. The importer had no right to make any protest, then, before the action of this tribunal. He had no right to make any protest against the appointee of the collector. * * * I think, therefore, evidence tending simply to show that the person selected by the collector had not the requisite knowledge—the familiar knowledge—of the subject-matter of the importation to enable him to discharge his duties satisfactorily cannot be regarded as sufficient ground for assaulting the action of the collector" (folio 38). "As to the validity of the appointment of the appraiser by the deputy collector, I will for the present instruct the jury that he had such authority" (folio 52). * * * "But Mr. Cadwalader, the collector, was called as a witness and testified that the appointment was actually made by him; that he exercised the judgment and discretion involved in the selection of a merchant appraiser. and that it was not exercised by Mr. Jones. * * * I simply say that if you believe the testimony of Mr. Cadwalader * * * this tribunal was lawfully constituted and had all the authority which the law gives to a tribunal for the ascertainment of the value of imported goods." (Folio, 65.)

6. The court erred in excluding from proof the classification of civil service employees and the testimony that William F. Read was not appointed pursuant to the said classification or the statute under which it was made. (See folios 40 and 41.)

* The "full substance" of the testimony excluded and comprehended within this assignment of error is that the civil service classification set out at record page 17, includes within its classes persons "receiving a compensation amounting to nine hundred dollars or more" per annum, and that the appointee in this case whose compensation exceeded that rate did not pass the examination prescribed by the statute quoted in the seventh paragraph of plaintiffs' argument, page 62.

7. The court erred in receiving evidence on behalf of the defendant as to who produced the samples before the mer-

chant appraiser—the answer to the question propounded at the opening of defendant's testimony at folio 42, as per objection and exception stated.

* This assignment relates to the testimony received under objection answering the following questions asked the merchant appraiser by the collector's counsel: "Q. Who produced the samples before you? A. The samples were produced by Mr. Fisher, the local appraiser or examiner, and another set of samples were produced by Mr. Mustin, the plaintiff—there were two sets of samples." (Record, page 18.)

8. The court erred in receiving testimony under the question asked the merchant appraiser by the defendant's counsel (see the record, page 18) as to whether the samples produced by the plaintiffs and those produced from the appraiser's office were of the same character. The court had excluded plaintiffs from this topic (fols. 33, 39, 49.)

* This assignment relates to testimony of the same witness received in answer to the question asked by the Govern counsel: "Were the samples produced by Mr. Mustin, the plaintiff, and that from the appraiser's of the same character? (objection.) A. Samples were produced by Mr. Fisher, the examiner, who examined the original packages, and were identified by him as coming from the original packages. This was in the presence of the plaintiff. There was no perceptible difference, so far as we could observe, between the two sets of samples." (Record, p. 18.) This error is intensified because plaintiffs had previously been prevented from proving the character and value of the goods "represented by the samples" (folio 33); and the effect of this objectionable testimony was of irretrievable prejudice to plaintiffs when it was followed by the exclusion from the evidence of "the identical samples" when they were offered to the court at folio 49. See plaintiffs' argument, pages 96, 99.

9. It was error for the court, upon the cross-examination of the merchant appraiser, Reed, when produced as a witness on the part of defendant, and after he had testified upon his examination-in-chief that he had seen certain

samples which he supposed were of the goods in question, to exclude from the cross-examination the inquiry (Record, p. 22) as to whether the witness at the time he saw the samples, as he supposed he did, was aware of the fact that the packages thus alleged to have been sampled were invoiced at different prices. The cross-examiner was shut out from this inquiry, which was very pertinent by way of testing the identity of the samples as representing various grades of goods.

10. It was in error for the court, in the same connection, to shut out any answer to the inquiry as to whether the witness Read could identify the goods he appraised. (Record, p. 22.)

*The exclusions of evidence complained of in assignment numbered 9 and 10 occur as follows: "Q. (Invoice shown witness.) You had this invoice before you once? A. Yes, sir. Q. And you are familiar with it? A. I was at the time. Q. Referring to this invoice, can you state which of the items are the items of which you saw samples; * * * do you remember how many samples Mr. Fisher produced? A. I have already answered that question, I believe. A. And you could not tell? A. We were then aware of the fact that they were invoiced. Q. At different prices? A. When the samples were produced? Q. Yes, sir. A. I had not had an opportunity to see the case then. Q. Then you were not aware of that fact (*i. e.*, that the goods were invoiced at different prices)?

Objected to as not cross-examination. Objection sustained. Exception by plaintiffs' counsel.

Q. Could you identify those goods to-day if you saw them?

Which question was objected to by the defendant's counsel, and the objection sustained by the court; to which ruling counsel for the plaintiffs duly excepted.

11. It was error for the court, particularly in view of the purpose of the examination-in-chief, on the part of the de-

fendant, of the witness, William F. Read, and the cross-examination to which he had been subjected and the dispute of fact as to whether he as merchant appraiser saw either the packages themselves or samples of them, or had made "a full and fair examination" of the goods in question, to exclude from evidence and from the jury's inspection the identical samples that were before Mr. Read at the time of the alleged appraisement, which samples (see folio 49) were offered for the purpose of testing the testimony of the witness that they were fair samples of the goods he appraised. They would also illustrate the "character and value" which had already been ruled out. Moreover, these exhibits, as offered, were competent and essential evidence in view of the direct testimony of Mr. Read that there was no perceptible difference between the samples. (Fols. 43, 49.)

In this connection it should be stated that the defendant's witness Fisher, the United States examiner, testified (folio 50) that the goods were not all alike, and that the original invoice entry, as well as the final appraisement (Record, pp. 13, 22, 24) papers in describing the goods, all show the merchandise in the various packages was not identical.

*This assignment is founded upon the exception to the exclusion from court of evidence covered by the following offer: "At this stage of the cross-examination plaintiffs' counsel offered in evidence the identical samples that were before Mr. Read at that time for the purpose of testing the testimony as already delivered that they were fair samples of the goods he appraised." (Fol. 49.)

12. It was error for the court (fols. 52, 53) to refuse to hold that section 2930, U. S. R. S., was unconstitutional, and that the merchant appraiser who assumed to act had no lawful authority to act as appraiser; that his appointment was unlawful and void, first, because the collector had no right to appoint; and, second, because the special deputy collector had no right to appoint. This error (see Record, p. 26) is

not cured by the permission given the defendant to produce further testimony, and the defendant in availing himself of this permission did not produce any fortifying testimony, as is hereinafter claimed.

13. The error for which the foregoing error is assigned is repeated in other forms under proper exceptions at folios 59, 35, 39; also Record, pages 30, 32, 33, 36, subsequently in the refusal (fol. 59) to direct a verdict, and the charge of the court, as excepted to in the direction given to the jury, that upon the testimony the "tribunal was lawfully constituted and had all the authority which the law gives to a tribunal for the imposition of duties" (see exceptions, Record, p. 39). Error in this respect is hereby assigned.

14. It was error for the court to receive in evidence the testimony of the defendant Cadwalader concerning his pretended appointment of Mr. Read as merchant appraiser, which testimony was received under two exceptions, stated at folios 53 and 54. It had already appeared in evidence that the appointment of Mr. Read as merchant appraiser was in writing, dated August 28, 1886, over the signature of "Charles Henry Jones, special deputy collector" (see Record, fol. 29), and the reception of parol testimony to explain, modify, or contradict this appointment was error.

*The following is the "full substance" of the objectionable testimony fairly indicated by this 14th assignment of error: The defendant, being examined in chief in his own behalf, was asked by his counsel and responded, all under objection, as follows: "Q. Do you remember the fact of the appointment of Mr. Read as appraiser in this case? A. Yes, sir; distinctly. Q. Will you state who made that appointment of Mr. Read? A. * * * I was requested to name a merchant appraiser on the 9th of July, when I was here attending to my duties, and names were submitted to me for selection. I selected Mr. Reed; at the time of the hearing the day before, or the day but one before, I had not returned from my vacation, and the designation was therefore carried out by the special deputy Mr. Jones who administered the oath upon my previous appointment, which had been made far back in July. (See oath administered August 30th, folio 30.) I returned on the 30th day of August, the day on which the first meeting occurred, when some reference was made to it, and I, under my own hand, and I think the paper is here in court, designated Mr. Read by letter to act in this case. Q. Is that the letter? A. That is the letter, and that is my signature to the letter." (See Rec., p. 26 and objections and exceptions there stated.) The following is the letter: "Custom House, Philadelphia, Pa., Collector's office, August 30th, 1886. Lewis Heyl, Esqr., U. S. gen'l pppraiser, dear sir: The merchant appraisement of a lot of worsted yarn, imported by Messrs. T. J. Mustin & Co., per 'Werra' intended to be held to-day, will be held to-morrow, the 31st instant, at 11 o'clock a. m., with Mr. W. F. Read as merchant appraiser. Respectfully, John Cadwalader, collector."

Q. Did you give Mr. Jones any instructions as to who was to be appointed? A. I made the selection and instructed Mr. Jones during my official vacation to make that appointment or to carry out my appointment, to notify Mr. Read. I recollect the case very distinctly."

On cross-examination: * * * "Is there any record of your selection of Mr. Read on July 9th? A. I do not know what you call a record; there is a letter from the appraiser, suggesting Mr. Read's name, addressed to me on that date. Q. On what day was Mr. Read first notified, if you know, pursuant to that direction? A. I only assume from the date of the paper; owing to the adjournment up to the end of August upon their own request; I think it was probably the 28th of August, just prior to my return. Q. That is to say, that was the earliest day you think any notice was sent to him? A. I have not looked into that fact. I will not state positively. He may have heard some intimation of it prior; I do not know. Q. You do not mean to say positively that Mr. Read had any notification of this appointment prior to August 30th, the day that he took the oath? A. My habit is to select these merchant appraisers with great care. I always try to see them and ascertain their knowledge of the subject on which they are to act, and I think it is probable I saw Mr. Read on this very subject; that is my belief and impression, that I had a conversation with Mr. Read on this very subject as to his qualification. Q. But you do not know of any official notice that Mr. Read had prior to the day he took the oath on the 30th of August? A. I do not know of any; if there is any in writing I would recognize it, of course." (Record pp. 26, 27, 28.)

15. It was error for the court to receive the testimony of the defendant in his own behalf tending to show conversations not in the presence of the plaintiffs or their agent, and to exhibit transactions in which plaintiffs had no part or concern, as is recorded on pages 26 and 27 of the record, and delivered for the purpose of fortifying in the defendant's behalf the unwarrantable appointment of Mr. Read.

* The testimony to which this assignment of error relates is set out in full at the end of the preceding assignment of error. An appropriate objection and exception was interposed to every question asked on the examination-in-chief and to each item of testimony thus delivered. This assignment alleges error in receiving the above-quoted testimony of the defendant narrating his interviews with Mr. Jones and Mr. Read, and in the refusal of the court to strike out such testimony as had been duly objected to. See the statement of the exception recorded at folio 54.

16. It was error for the court to have received in evidence against the plaintiffs the paper or written declaration of the defendant, Cadwalader, offered in evidence in his own behalf and received under the plaintiffs' objection and exception at folio 54. *Res inter alios acta.*

*This assignment is aimed exclusively at the alleged error in receiving in evidence in the defendant's own behalf his own letter above quoted; the letter being to a stranger to the action and not the appointment or warrant of authority for Mr. Read to act. This warrant is set out in full at folio 29, and also, in substance, at pages 1 and 2 of this reply brief.

17. It was error for the court to permit the defendant to testify on his examination-in-chief in his own behalf in answer to the following question propounded to him by his own counsel: " Q. Did you give Mr. Jones any instructions as to who was to be appointed?" such testimony being incompetent, immaterial, and irrelevant, and the exception thereto well taken (see Record, page 27, folio 55). Under this exception a large amount of testimony was delivered, for which see Record, pages 27, 28, 29. This testimony was specially obnoxious to the common-law limitations upon collateral conversations occurring in the absence of the party to be affected. It also tended to show an appointment not made by Charles Henry Jones, but made by word and not by deed of the defendant, Cadwalader, in a manner not authorized by the Treasury regulations, which formed the legal warrant and method of procedure for the defendant, and which regulations under the statutes required the appointment of the merchant appraiser to be in writing over the signature of the appointing officer, and in the form designated in article 467 of Treasury regulations, set forth at folio 91, and followed in this case, at folio 29. This form begins, " You are hereby appointed," etc.

* The testimony-in-chief of the defendant to which this assignment of error relates is recited in connection with the three preceding assignments of error.

18. It was error of the court not to permit plaintiffs' counsel upon the cross-examination of the defendant when produced as a witness in his own behalf, to enquire as to whether the defendant had had any conversation with the merchant appraiser, Mr. Read, after being made aware that the importer had made objection to him. This enquiry was excluded and the exception thereto at Record, page 29, is assigned for error.

* The question referred to in this assignment followed the

testimony of the defendant that he had had some conversation with Mr. Read before the appointment, after which the witness, being upon *cross*-examination, was asked: "Q. Did you not have a conversation with him after an objection was made to him?" This question was not permitted to be answered. (Rec., p. 29.)

19. It was error for the court to exclude, as it did exclude at folio 57, the defendant's testimony when under the plaintiffs' cross-examination as to whether the merchant appraiser's name is, according to the usual course of business, known to the importer prior to the time fixed for the hearing.

Plaintiffs had shown their expressed dissatisfaction against Mr. Read, had offered evidence (which had been excluded) that they protested against his appointment, and were entitled to prove that this was done promptly, and that under the usual course of business, as soon as knowledge of the objectionable appointment was obtained. This and the preceding exclusion doubtless proceeded on the ground, expressed in the court's charge, that (fol. 64–77) the importer had no right to assail the appraiser's statutory qualifications or to express or to prove the circumstances of any protest against the collector's "decision" appointing a merchant appraiser, notwithstanding sec. 2931 expressly confers that right against any and every decision a collector may make. The exception to this exclusion is assigned for error.

* The question here referred to was as follows: "Q. According to the usual course of business in the collector's office is the merchant appraiser's name known to the party prior to the time fixed for the hearing?" (Folio 57.)

20. It was error for the court, after the case had been closed and already once reopened and again closed and while plaintiffs' counsel was again addressing the jury, to permit the evidence to be again reopened and the witness Read to be recalled by the defendant. See folio 60, where the Court

holds that, as the witness was acting merely in an "*official capacity*" and apparently disinterested, the case might be reopened. This error is assigned upon the ground that judicial discretion has been so abused as to amount to error.

21. It was error for the court to permit the witness, whose examination and memory had been exhausted, to be asked by the party calling him as to whether, after he had left the stand, he had gained "a more distinct recollection" on the topic he had testified about. (See exception, folio 61.) The fact that the examination of the particular packages in question by the witness was in dispute, as well as whether samples of those packages had actually been examined, rendered this proceeding onerous and prejudicial to the plaintiffs before the jury. This amounted to error.

22. It was error for the court to charge the jury (see Record, page 32, and exception thereto at folio 76) that the appraisement "was to be made by the selection by the collector of one discreet and experienced merchant to be associated with one of the general appraisers, wherever practicable, or two discreet and experienced merchants *and one general appraiser*. The duty to make the selection of what is called the merchant appraiser is thus confided to the collector."

This was obvious error in not stating section 2930 correctly, the statute not providing for a board of three members; also in the instruction that to the collector was confided the selection of the merchant appraiser. It was also error because the appointment of the merchant appraiser in this case was not by the collector and because the instruction permitted the jury to pass upon the question as to whether the collector did in fact in this case appoint a merchant appraiser, the warrant of whose appointment was signed by another officer (see folio 29), and because by this instruction the court sought to enforce an unconstitutional statute.

23. It was also error for the court to charge the jury, as it did charge, in the following words:

"The importer has no right to participate in this selection in any way; it is not required even that the collector shall give the importer notice, but, upon notice or demand by the importer of a reappraisement, the collector is to make the selection of an experienced person who, *in his sole judgment*, has the qualifications contemplated by the act of Congress, and when he makes that selection, if he does it in good faith and honestly, his action is not open to question by anybody." (See the exceptions to this part of the charge at folio 77.) The statutory qualification is an *essential fact.*

24. It was also error for the court to charge the jury as follows:

"The importer has no right to go to him (the collector) afterwards and file a protest, saying, 'Why, this merchant appraiser is not satisfactory to me; he has not, in my judgment, the qualifications which the law requires, and you ought, therefore, to dismiss him and substitute another person for him;' the law gives the importer no such right, but it is to the *honest judgment of the collector that the selection of a person who, with the general appraiser, is to constitute this tribunal is committed.*"

This charge was error. (See exception at folio 77.)

25. It was also error for the court to charge that there were but two questions in the case, namely, Was the tribunal properly constituted, and was its finding "so objectionable that the law will regard it as never having been made at all?" (See exception in the record at the top of page 39.) This charge directs the attention of the jury specially to the conclusions of the tribunal concerning whose proceedings testimony was excluded from the jury. It also compelled the jury to adopt as its own conclusions the conclusions of the members of the board, who stated them on the witness

stand, without any opportunity on the part of the jury to hear in detail the actual proceedings or grounds of law or of fact upon which such conclusions were reached.

26. It was also error for the court to charge, as it did charge at folio 65, that if the jury believed the testimony of Mr. Cadwalader, and the learned judge discerned "no reason whatever why you should doubt it," the law was complied with so that the tribunal was properly constituted. "I do not deem it necessary to say anything as to whether the act of Mr. Jones would have been valid or not, because, in view of Mr. Cadwalader's testimony, it does not seem to me to be a practical question in this case. I simply say that if you believe the testimony of Mr. Cadwalader—and I repeat that there is no reason why you should not believe it—this tribunal was lawfully constituted and had all the authority which the law gives to a tribunal for the imposition of duties." (See the exception to these sentences in the charge on page 39.)

27. It was error for the court to charge:

"Whatever errors may be alleged to have been committed by these appraisers in the course of discharging their duties, which are in the mere category of irregularities—although they may have operated harshly or unjustly, if you choose, upon this importer—is not a matter for our consideration at all." (See exception at folio 78.)

This charge practically withdrew from the consideration of the jury any alleged irregularities in the procedures of the tribunal. It left such irregularities to be considered only by the court, and not even by the court unless they were in its own judgment "of such a character as to make it imperative" upon the court to disregard the judgment of the tribunal—that is to say, unless the court so decided the questions of fact touching such alleged irregularities as to establish them in fact and in law as illegal proceedings, the jury need not consider them. This charge practically withdrew from the jury the questions of fact as to whether the appraisers saw the examination packages or actually saw any fair samples thereof, or in fact did anything except to sign an alleged appraisement. It substituted the conclusions upon these topics of the appraising tribunal and the judgment of its members as expressed upon the stand or in their certificate in the place of the independent judgment of the jurors as to whether the members of that tribunal were or were not guilty of "irregularities."

28. It was error for the court to charge, as it did charge at folio 68, to the effect that if the members of the appraising tribunal did not see the goods at all until after they had signed a report exhibiting their conclusions it did not matter "whether the examination was made before or after the report was made out and signed by the appraisers." (See exception at top of page 40, folio 78.)

This instruction did not permit the jury to take into consideration the important circumstance as to whether or not it was not true that the actual conclusion was reached and formulated by the appraisers before they went through the pretense or form (if they did in fact go through that form, which plaintiffs claimed was untrue) of a physical examination or inspection of the packages designated by the collector for that purpose. The circumstance itself was of grave importance as bearing upon not only the testimony of the members of the tribunal, but the truth of the irregularities as claimed by plaintiffs of their failure to make such full and fair examination of the goods as is required by the statutes, regulations, and the reasonable performance of official duty. Besides the circumstance was pregnant respecting the issue whether the board did proceed by "reasonable ways and means" as prescribed by the statute.

29. It was error for the court to charge as it did charge (folio 73):

"Because you think they did not examine every portion of those three bales, it is not for you to say that their finding is void. All that the law requires is that they should fairly make such full examination as *they deem sufficient* to enable *them* to decide the question submitted for *their* determination." (See exception on page 40.)

This charge practically submitted the conclusions of the appraisers and the *opinions* of the witnesses Heyl and Read in place of the conclusions of the jury upon their shifting testimony. This charge left no room for the jury to weigh doubtful testimony or to exercise their own judgment upon any other question than the question as to whether these two witnesses were satisfied with themselves.

30. It was also error for the court to charge, as it did charge, in effect, that because Mr. Mustin was at one time present before the appraising tribunal, having some samples in his hands, that that was "in effect a declaration" of Mr. Mustin that he had brought the samples of the very packages that were to be examined (fol. 78).

This was error. There was no testimony that he brought samples from the invoice or packages in question. The evidence and regulations showed that the packages were not in his custody. He might have brought samples of other goods to illustrate, either of his own or of other people. The fact that he had samples with him did not excite any legal presumption whatever; much less was it "in effect a declaration by Mr. Mustin to the appraisers" of any kind whatever either that they were the samples of his own goods or of any other kind.

31. It was error for the court to refuse to charge that for the validity of the appraisement the merchant appraiser and general appraiser "should examine at least one of the cases or packages of the goods of the invoice under consideration that were designated by the collector and sent to the

public stores for examination for the purpose of the appraisement." (See folio 79.) Neither this instruction nor its substance was anywhere given in the charge, and what was said upon the subject of the necessity to examine those packages was qualified by the alternative issue submitted in the charge as to whether samples were not examined to the *satisfaction of the appraisers* and as a substitute for the statutory examination of the packages themselves.

32. It was error for the court to refuse to charge, as it did refuse (folio 79), that for the validity of the reappraisement it was necessary that the merchant appraiser, as well as the general appraiser, "should see and examine at least one of the original cases or packages from the invoice."

33. It was additional error for the court in refusing to charge either of the last preceding propositions to qualify either of them with the alternative, as submitted to the jury (see Record, page 41), that if the appraisers had before them samples taken from three of the packages designated, "and fairly and sufficiently showing the kind, quality, and character of the goods," the act of Congress was substantially complied with. (See the special exceptions to this refusal and qualification at Record, pages 41 and 40.) Besides, the court had excluded the samples themselves, without which their fairness and sufficiency were incapable of being tested

34. It was error for the court to refuse to charge, as it did refuse (folio 80), that the "examination of samples, even though they may have been fair samples, did not dispense with the necessity for an examination of the goods contained in at least one of the original cases or packages." Plaintiffs insisted that at least one of the original packages must itself be examined under the law, and that for this examination there could be no substitution or constructive examination by sample.

35. It was error for the court to refuse to charge, as it did refuse, that if the jury concluded "that samples *only* were examined" they must find for the plaintiffs, on the ground that there was an irregularity in the appraisal and a noncompliance with the law (see folio 80).

36. It was error for the court to refuse to charge the jury that if they believe plaintiffs were prevented from being present at the examination of their goods while it was being made by the reappraisers that then the proceeding was unlawful and irregular. (See folios 80 and 81). This error is not cured by the statement of the reason assigned by the court for refusing to give that instruction, viz., that there was no evidence that would warrant the jury in finding that the plaintiff was prevented from being present at any time or at any stage of the proceeding. There was some such evidence (Rec., p. 21), and such was the course of business apparent from the regulations and instructions under which concededly the appraisers were acting, and which, being also in evidence, are set out in full in the Record, pages 48 to 66; also article 1410, folios 114–118. Mr. Read testified that he did "not know of any means that Mr. Mustin had of being present" (p. 21).

* The language of the instruction requested and refused and mentioned at the head of this assignment is as follows: "If the jury believe that the plaintiffs were prevented from being *present at the examination of their goods* by the reapprasers, then the plaintiffs are entitled to recover. In that case there was an unlawful or irregular proceeding, and therefore no appraisement within the meaning of the statute.

"To the refusal of the court to charge as so requested plaintiffs' counsel duly excepted, and the exception was allowed by the court."

37. It was error for the court in refusing to charge as requested in the foregoing assignment to add the further and

unjustifiable instruction that it was no part of the duty of the appraisers to notify the plaintiffs what they were going to do and ask him to be present (see the exception to this instruction to the jury at folio 81.)

The points of error presented by assignments of error 29, 30, 31, 32, 33, 34, and 35 were specially brought to the notice of the court, both before the charge and after the charge, and special exceptions taken and allowed (see page 37 and also pages 40 and 41.

* The specifications of error in these instances and in every other instance when alleged to the charge of the court, whether to instructions given or refused, set out, in each instance by quotation as denoted in the assignment, " the part referred to *totidem verbis.*"

12

123-37

123-372

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

ORIGINAL.

IN THE MATTER OF THE PETITION

OF

WILLIAM M. HENRY FOR WRIT OF HABEAS CORPUS.

MOTION, PETITION, AND EXHIBITS.

ISAAC M. BRYAN, *Counsel for Petitioner.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

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INDEX.

	Original.	Print.
Bill of exceptions—first indictment	27	~~9~~ 13
Bill of exceptions—second indictment	82	27
Certificate of clerk of circuit court	51	17
Certificate of clerk of circuit court	95	30
Demurrer to plea in bar	66	21
Exhibit "A" to petition for writ	11	4
Exhibit "B" to petition for writ	53	17
Indictment—first	12	4
Indictment—second	54	~~17~~ 18
Judgment and sentence of district court—first indictment	25	~~8~~ 9
Judgment and sentence of district court—second indictment	62	20
Judgment and sentence of circuit court—first indictment	50	16
Judgment and sentence of circuit court—second indictment	93	30
Motion for leave to file petition for *habeas corpus*	1	1
Motion in arrest of judgment—first indictment	30	10
Motion in arrest of judgment—second indictment	73	24
Order on motion to quash first indictment	26	9
Order on motion in arrest of judgment—first indictment	36	12
Order on motion in arrest of judgment—second indictment	77	25
Order allowing writ of error to district court—first indictment	46	15
Order allowing writ of error to district court—second indictment	90	29
Order overruling plea in bar to second indictment	68	22
Plea in bar to second indictment	63	20
Petition for writ of error to district court—first indictment	44	15
Petition for writ of error to district court—second indictment	88	28
Petition for writ of *habeas corpus*	2	1
Verdict—first indictment	25	8
Verdict—second indictment	62	20
Writ of error to district court—first indictment	47	16
Writ of error to district court—second indictment	91	29

1 In the Supreme Court of the United States.

Ex Parte William M. Henry, *alias*, &c.

Motion for leave to file petition for writ of *habeas corpus*.

The said William M. Henry, *alias*, &c., by his counsel, respectfully moves the court for leave to file the accompanying petition for a writ of *habeas corpus* to be directed to E. M. Boykin, Esq., United States marshal for the district of South Carolina, in whose custody the said William M. Henry, *alias*, &c., is illegally confined and restrained of his liberty, and for other relief by way of certiorari; and the said William M. Henry, *alias*, &c., respectfully refers to the said accompanying petition for a statement of the facts and of the objects of his motion.

ISAAC M. BRYAN,
Counsel for Petitioner.

2 To the Honorable Morrison R. Waite, Chief Justice, and his associates, justices of the Supreme Court of the United States:

The petition of William M. Henry, *alias*, &c., respectfully shows to the Court—

1. That your petitioner is illegally confined and restrained of his liberty, in the custody of E. M. Boykin, United States marshal for the district of South Carolina, by virtue of two certain judgments and two sentences pronounced against him on the (9th) ninth day of April, 1887, by the circuit court of the United States for the district of South Carolina, at Charleston, South Carolina, upon two certain separate and distinct indictments found against him for an alleged violation of section 5480 of the Revised Statutes of the United States. A transcript of the record in each of the said cases of the United States against your petitioner is herewith filed as a part of this petition, marked, respectively, "Exhibit A" and "Exhibit "B."

3 2. Your petitioner alleges that, with regard to the first indictment—

(A.) The matters and things set forth in the 4th count of the said indictment do not constitute any offense against section 5480 of the Revised Statutes of the United States under which the indictment was filed in this case, because there is no allegation in said 4th count that the defendant, your petitioner, incited the writing of the letter alleged therein to have been received by him.

(B.) That the only proof of any fraudulent scheme in this case consists of a circular letter, a copy of which is contained in the transcript of record herewith filed, alleged to have been found in the house of defendant, petitioner, which said circular letter should have been set forth in the indictment "*in hæc verba*."

(C.) That the matters and things set forth in the 5th count of the said indictment do not constitute any offense against sec. 5480 of the Revised Statutes of the United States under which the indictment was filed in this case.

(D.) That the only proof of any fraudulent scheme in this
4 case consists of a circular letter, a copy of which is contained
in the transcript of record herewith filed, alleged to have been found in the house of defendant, petitioner, which said circular letter should have been set forth in the indictment "*in hæc verba.*"

Your petitioner further alleges that the said court, in trying the said "first indictment" against your petitioner and in passing judgment thereon, acted in violation of articles V and VI of the articles in addition to and amendment of the Constitution of the United States; and your petitioner further alleges that the said court acted without jurisdiction of the person or of the cause, and that the whole proceedings are null and void.

3. Your petitioner alleges, with regard to the second indictment—

(A.) That the three offences charged therein are alleged to have been committed by your petitioner within the first six calendar months of the year 1886, the same period within which the six offences set forth in the first indictment are alleged to have been committed.

5 (B.) That by the provisions of sec. 5480 of the Revised Stat-
utes of the United States, under which said indictments are laid, there can be but one indictment and a "single sentence" for any offense against said sec. 5480 of the Revised Statutes of the United States when the offenses charged (as in these cases) are included within the same six calendar months.

(C.) That the matters and things set forth in the first count of the said indictment do not constitute any offense against said section 5480 of the Revised Statutes of the United States, under which the indictment was filed, because there is no allegation that defendant, petitioner, incited the writing of the letter alleged therein to have been received by him.

(D.) That the only proof of any fraudulent scheme in this case consists of a circular letter, a copy of which is contained in the transcript of record herewith filed, alleged to have been found in the house of petitioner, which said circular letter should have been set forth in the indictment "*in hæc verba.*"

Your petitioner further alleges that the said court, in trying
the said "second indictment" against your petitioner and
6 in passing judgment thereon, acted in violation of the plain
provisions of section 5480 of the Revised Statutes of the United States and of articles V and VI of the articles in addition to and amendment of the Constitution of the United States; and your petitioner further alleges that the said court acted without jurisdiction of the person or of the cause, and that the whole proceedings are null and void.

4. And your petitioner further shows that he filed a "plea in bar" to the said second indictment, which was overruled by the court, as

will appear from the aforesaid transcript of the record, marked "Exhibit B," herewith filed.

5. And your petitioner further shows that the said cases were originally brought in the district court of the United States for the said district of South Carolina, at Greenville; that he moved the said district court in arrest of judgment in the said cases upon the grounds and for the reasons hereinbefore set forth, which motions were heard by the court and overruled, as will appear from the
aforesaid transcripts of the records, herewith filed, marked
7 "Exhibit A" and "Exhibit B;" and thereupon the said court
pronounced judgment and sentence against your petitioner in each of the said cases, the aggregate punishment being imprisonment at hard labor for the period of twenty-seven months in the penitentiary at Columbia, State of South Carolina, and in the penitentiary at Albany, State of New York; that on writ of error to the circuit court of the United States for the said dist. of South Carolina the said sentences of the said district court were reversed and new sentences were imposed upon your petitioner similar to the sentences of the dist. court, with the exception of hard labor; that your petitioner was not present before the court when the said new sentences were imposed, but was in the penitentiary at Columbia, where he is now confined; that your petitioner submits that said sentences so pronounced are null and void; that thereupon he was forthwith taken into the custody of the said E. M. Boykin, Esq., United States marshal for the district of South Carolina, who now illegally holds your petitioner and restrains and deprives him of his liberty.

Wherefore your petitioner prays that he may have the
8 benefit of the writ of *habeas corpus*, to be directed to E. M.
Boykin, marshal of the United States for the district of South Carolina, commanding him to have before this honorable court, at a day and place to be named therein, the body of your petitioner (and to certify the true cause of his detention), to undergo and receive whatsoever this honorable court shall then and there consider of him in that behalf; and your petitioner also prays that he may have the benefit of the writ of certiorari, directed to the Honorable Hugh L. Bond and the Honorable Charles H. Simonton, judges of the circuit court of the United States for the district of South Carolina, commanding them to certify forthwith to this honorable Court, under the seal of the said circuit court of the United States for the district of South Carolina, a true and complete transcript of the records in each of the said cases of the United States against your petitioner.

And your petitioner will ever pray, &c.

W. M. HENRY.

9 UNITED STATES OF AMERICA, *District of South Carolina:*

This day personally appeared before me, T. S. Bryan, a notary public for the State of South Carolina, duly appointed commissioner and qualified by the State of South Carolina, William M. Henry, who, being duly sworn according to law, deposes and says that he is the person named as the petitioner in the foregoing petition and whose name is signed thereto, and that the matters and things therein contained and the facts therein stated are true.

W. M. HENRY.

Subscribed and sworn to before me this 23rd day of June, A. D. 1887. In testimony whereof I have hereunto set my hand and official seal.

[Seal T. S. Bryan, Notary Public, South Carolina.]

T. S. BRYAN,
Notary Public, S. C.

STATE OF SOUTH CAROLINA, *County of Richland:*

10 I, E. R. Arthur, clerk of the circuit court for the county of Richland, in the State of South Carolina, being a court of record held therein, do certify that T. S. Bryan, whose name is subscribed to the certificate of proof of the foregoing affidavit, was on the day of the date thereof a notary public in and for the said State of South Carolina, commissioned and sworn and duly authorized to administer oaths, and I am well acquainted with the handwriting of the said notary public and verily believe that the signature is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 23 day of June, A. D. 1887.

{Seal of Circuit Court, Common Pleas and General Sessions, Richland County, S. C.}

E. R. ARTHUR,
Clerk of Circuit Court.

Endorsed: In the Supreme Court of the United States. In the matter of the petition of Wm. M. Henry, *alias*, &c., for writ of *habeas corpus*. Motion, petition, &c. Isaac M. Bryan, counsel for pet'r.

11 EXHIBIT A.

12 THE UNITED STATES OF AMERICA, *West. District of So. Ca.:*

In the Dist. Court.

THE UNITED STATES *vs.* WM. M. HENRY, *alias*, &c.

At a stated term of the district court of the United States for the western district of South Carolina, begun and holden at Greenville, within and for the district aforesaid, on the first Monday of August, in the year of our Lord one thousand eight hundred and eighty-six, the jurors of the United States of America within and for the district aforesaid—that is to say, upon their oaths—present that heretofore, to wit, on the 12th day of March, in the year of our Lord one thousand eight hundred and eighty-six, at Rock Hill, in the county of York, in the State of South Carolina, in the western district of South Carolina, and within the jurisdiction of this court,

William Henry, otherwise called J. J. Smith, otherwise called Jno.
Andrew, otherwise called E. E. Turner, late of the county of York
aforesaid, having devised a scheme and artifice to defraud
13 divers persons to the jurors unknown, did in and for execut-
ing such scheme and artifice and attempting so to do wilfully
and unlawfully, with force and arms, receive from the post office at
Rock Hill, in the State of South Carolina, the said post office being
a post office of the United States, a letter in the words and figures
following:

"FT. KLAMATH, OR., *M'ch 7th*, 1886.

"DEAR SIR: Enclosed find 1 $10 bill, and please send 100 of your stock, and, if they are as represented, I will send for a large stock at once. Send fives and tens—half and half.

"Yours in confidence, WM. MOORE,
"*Tro-p M, 2d U. S. Cav., Klamath Co., Ft. Klamath, Or.*"

Contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further
present that the said William ——, having devised a scheme and
artifice to defraud divers persons to the jurors unknown by
14 inciting said persons to open communication by means of the
post-office establishment of the United States with the said
William ——, did, on the 12th day of March, A. D. 1886, at Rock
Hill aforesaid, in and for executing said scheme and artifice and
attempting so to do, wilfully and unlawfully receive from the post
office at Rock Hill aforesaid, the said post office being a post office
of the United States, a letter signed "Edward Williams," post-marked
"Pleasant Valley, S. C.," addressed to "J. J. Smith, box 83, Rock
Hill, S. C.," in which said letter the writer thereof wrote for particu-
lars of a certain advertisement headed Greenback in the Police Ga-
zette of January 30th, 1886, contrary to the form of the act of Con-
gress in such case made and provided and against the peace and
dignity of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further
present that the said William ——, having devised a scheme
15 and artifice to defraud divers persons to the jurors unknown
by opening and intending to open correspondence and com-
munication with said divers persons by means of the post-office
establishment of the United States, and by inciting said divers per-
sons to open communication with the said William —— by means
of the post-office establishment of the United States, did, on the day
and year last aforesaid, at Rock Hill aforesaid, in and for executing
such scheme and artifice and attempting so to do, wilfully and un-
lawfully place in the post office of the United States at Rock Hill
aforesaid a letter addressed to Ed. Williams, Pleasant Valley, S. C.,
which said letter is in the words and figures following:

Rock Hill, S. C., 1886.

My Dear Sir: Yours of recent date to hand, and, as I take
16 you to be a gentleman of a speculative disposition and one
who would be willing to make a lot of money rapidly, provided it could be made safely, I make known to you the speculation as referred to in your letter. In case you do not engage in the business I trust you will not violate the trust imposed in you. If you enter into this exchange business you can make money faster than in any other business. You can make all the money you want in a short time with perfect safety. The goods I want you to exchange are very fine imitations of "Uncle Sam's greenbacks." I have them in No. 1, 2, 5, & 10's; also the 10 & 20 doll. silver bills. I guarantee you the goods are equal to the genuine, and there is absolutely no fear of detection. You can get them at $10 per 100, or 300 for 25
doll., and 1,000 doll. for 75 doll. I will not sell or send out
17 less than $100; price, 10 doll. If you want to make money
very fast I advise you to raise all the money you can and send it on at once and get a large stock of the goods while the opportunity lasts, as no one can tell how long that may be. Send money only in plain envelope marked "If not rec'd in five days" return to you. In this way, if not delivered to me, it will be returned to you and will be entirely safe. Under no circumstances will I receive or sign for a registered letter or money order, as the authorities might get proof against me that way. Hoping to start a business that will prove mutually profitable,

I am, yours in confidence, J. J. SMITH.

Lock box 83, Rock Hill, S. C.

Address carefully and return all communications.

Contrary to the act of Congress in such case made and pro-
18 vided and against the peace and dignity of the United
States.

And the jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 12th day of March, in the year of our Lord one thousand eight hundred and eighty-six, at Rock Hill, in the county of York, in the State of South Carolina, in — western district of S. C., and within the jurisdiction of this court, William Henry, otherwise called J. J. Smith, otherwise called Jno. Andrew, otherwise called E. E. Turner, late of the county of York aforesaid, having devised a scheme and artifice to defraud divers persons, to the jurors unknown, by selling to certain other persons, to the jurors unknown, divers forged and counterfeited United States Treasury notes, to be by such certain other persons passed, uttered, & published as true, did, in and for executing such scheme
and artifice and attempting so to do, wilfully and unlawfully,
19 with force and arms, receive from the post office at Rock Hill,
in — State of South Carolina, the said post office being a post office of the United States, a letter in the words and figures following:

"Ft. Klamath, Or., *M'ch 7th*, 1886.

Dear Sir: Enclosed find 1 $10 bill, and please send 100 of your stock, and if they are as represented I will send for a large stock at once; send fives and tens, half and half.

Yours, in confidence, WM. MOORE,
Troop M, 2nd U. S. Cav., Klamath Co., Ft. Klamath, Or."

Contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States; and the jurors aforesaid, upon their oaths aforesaid, do further present that the said William ——, having devised a scheme and artifice to defraud divers persons, to jurors unknown, by selling to certain other persons, to the jurors unknown, divers forged and counterfeited United States Treasury notes, to be by such certain
20 other persons passed, uttered, and published as true by inciting said persons to open communication by means of the post-office establishment of the United States with the said William ——, did, on the twelfth day of March, A. D. 1886, at Rock Hill aforesaid, in and for executing such scheme and artifice and attempting so to do, wilfully and unlawfully receive from the post office at Rock Hill aforesaid, the said post of the United States, a letter signed "Ed. Williams," postmarked "Pleasant Valley, S. C.," addressed to "J. J. Smith, box 83, Rock Hill, S. C.," in which said letter the writer thereof wrote for particulars of a certain advertisement headed Greenback in the Police Gazette of January 30th, 1886, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said William ——, having devised a scheme
21 and artifice to defraud divers persons, to the jurors unknown,
by selling to certain other persons divers forged and counterfeited U. S. Treasury notes, to be by such certain other persons passed, uttered, and published as true, by opening and intending to open correspondence and communication with said divers persons by means of the post-office establishment of the United States, and by inciting said divers persons to open communication with the said William —— by means of the post-office establishment of the United States, did, on the year and day last aforesaid, at Rock Hill aforesaid, in and for executing such scheme and artifice and attempting so to do, wilfully and unlawfully place in the post office of the United States at Rock Hill aforesaid a letter addressed to "Ed. Williams, Pleasant Valley, S. C.;" which said letter is in the words and figures following:

Rock Hill, S. C., 1886.

22 My Dear Sir: Yours of recent date to hand, and, as I take you to be a gentleman of a speculative disposition and one who would be willing to to make a lot of money rapidly, provided it could be made safely, I made known to you the speculation, as referred to in your letter. In case you do not engage in the business I trust you will not violate the trust imposed in you. If you

enter into this exchange business you can make money faster than in any other business; you can make all the money you want in a short time, with perfect safety. The goods I want exchanged are very fine imitations of "Uncle Sam's greenbacks." I have them in No. 1, 2, 5, & 10's; also the 10 & 20 doll. silver bills. I guarantee you the goods are equal to the genuine, and there is absolutely no fear of detection. You can get them at $10 per one hundred or $300 for $25 and $1,000 for $75. I will not sell or send out less
23 than $100—price 10 doll. If you want to make money very fast I advise you to raise all the money you can and send it on at once and get a large stock of the goods while a- opportunity lasts, as no one can tell how long that may be. Send money only in a plain envelope, marked if not rec'd in 5 days return to you. In this way if not delivered to me it will be returned to you, and will be perfectly safe. Under no circumstances will I receive or sign for a registered letter or money order, as the authorities might get proof against me that way. Hoping to start a business that will prove mutually profitable, I am yours in confidence,

J. J. SMITH.

Lock box 83, Rock Hill, S. C.
Address carefully and return all communications.

Contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States.

LEROY F. YOUMANS,
U. S. Att'y.

24 United States of America,
District of South Carolina:

In the District Court.

Clerk's Office.

I, Ephriam M. Seabrook, clerk of said court, do hereby certify that the foregoing indictment is a true copy of the original now on file and of record in my office.

Given under my hand and seal of said court, in the city of Charleston, S. C., this tenth day of November, A. D. 1886.

[SEAL.] (S'g'd) E. M. SEABROOK,
C. D. C. U. S., S. C.

25 (Endorsements:) U. S. of America, west. dist. of S. C. District court. The United States *vs.* William Henry, otherwise called J. J. Smith, otherwise called Jno. Andrew, otherwise called E. E. Turner. Indictment for violation of section 5480, misusing the post-office establishment of the United States. Leroy F. Youmans. Filed 11 Sept., 1886. E. M. Seabrook, C. D. C. U. S., S. C.

True Bill.

H. E. GRAY, *Foreman.*

Guilty on 4th & 5th counts.
Sept. 21, '86.

JULIUS C. SMITH, *Foreman.*

Sentence.

The sentence of the court is that the defendant, William Henry, *alias* J. J. Smith, *alias* John Andrew, *alias* E. E. Turner, be imprisoned at hard labor in the South Carolina penitentiary, at Columbus, for the term of twelve months.

CHARLES H. SIMONTON,
Dist. Judge U. S. for Dist. of S. C.

26 *Order on Motion to Quash the Indictment. Filed Sept.* 13*th*, 1886.

THE UNITED STATES OF AMERICA,
Western District of So. Ca.:

THE UNITED STATES *vs.* WILLIAM HENRY, *alias*, &c.

Indictment under sec. 5480, R. S. U. S.

This is a motion to quash the indictment, in many respects resembling a motion to dismiss a complaint, because it does not constitute facts stating a cause of action—in other words, an oral demurrer.

It is so important to a defendant on trial for a criminal offence that the result of the trial should be an end of the prosecution that I would not grant such a motion unless I became perfectly satisfied that it must be granted. When such a motion is addressed to verbal or immaterial errors in the indictment, and, if when granted, an amendment would not change the real nature of the 27 offense charged or work a surprise upon the person accused such an amendment would be granted under the operation of sect. 1025 of the Revised Statutes.

Each count in the indictment is a separate and distinct charge and must stand or fall without reference to other counts in the same indictment.

The very lucid and able argument of the defendant's attorney has satisfied me that the first and second counts are bad and must be stricken out.

The first count does not state the unlawful artifice or device, nor is there anything in the count which discloses it. There is no charge that he either opened a correspondence or incited correspondence. The count in effect only charges that he received a letter making an unlawful proposition.

The second also omits to set out the unlawful artifice or device. The letter, the foundation of the charge, is not set out, nor is it stated with sufficient certainty when the advertisement upon 28 which the charge of inciting the correspondence was published, nor what was the character of the advertisement. The defendant might prepare a full defense for an advertisement appearing in one paper; he might be met by evidence of an entirely different advertisement in another paper. I think that these defects make these counts bad, and that an amendment making them good may operate as a surprise upon the defendant and perhaps change the character, or at least the force, of the offence charged.

I am not so well satisfied upon objections to other counts of the indictment, and to some of them at present I see no objection.

It is ordered that as to the first and second counts of the indictment the motion be granted; as to the other counts it is dismissed.

13 Sept., 1886.

(S'g'd) CHARLES H. SIMONTON.

United States of America, *District of South Carolina:*

In the District Court.

Clerk's Office.

29 I, Ephriam M. Seabrook, clerk of said court, do hereby certify that the foregoing motion to quash indictment is a true copy of the original now on file and of record in my office.

Given under my hand and seal of said court this 10th day of November, A. D. 1886, at Charleston, S. C.

[SEAL.] E. M. SEABROOK,
C. D. C. U. S., S. C.

Endorsements: U. S. of America, dist. of So. Ca., west. district. The United States *vs.* William Henry, *alias*, &c. Order on motion to quash the indictment. Filed 13 Sept., 1886. E. M. Seabrook, C. D. C. U. S., S. C. Copy.

30 The United States of America,
District of South Carolina, in the West. District:

Dist. Court. August Term.

The U. S. *vs.* Wm. Henry.

Indictment under section 5480, R. S. U. S. 1st indictment.

And now, after verdict and before sentence, comes the said defendant, William Henry, and prays that judgment herein be arrested, and for cause says:

As to the 4th count:

First. That the matters and things set forth in the 4th count of the said indictment do not constitute any offense against section 5480 of the Revised Statutes U. S., under which the indictment was filed in this case, because there is no allegation in said 4th count that the defendant incited the writing of the letter alleged therein to have been received by him.

Second. That the only proof of any fraudulent scheme in this case consists of a circular letter, a copy of which is hereto 31 annexed, marked "A," found in the house of the defendant, which said circular should have been set forth in the indictment *in hæc verba*.

Third. That there was no proof on the trial of said cause other than said circular letter, marked "A," hereto annexed, that defendant offered counterfeit money for sale.

As to the 5th count:

First. That the matters and things set forth in the 5th count of the said indictment do not constitute any offense against section 5480 of the Revised Statutes of the U. S., under which the indictment was filed in this case.

Second. That the only proof of any fraudulent scheme in this case consist of a circular letter, a copy of which is hereto annexed, marked "A," found in the house of the defendant, which said circular letter should have been set forth in the indictment *in hæc verba.*

32 Third. There was no proof offered that defendant offered counterfeit money for sale other than said circular.

And generally for other manifest defects in the record aforesaid appearing.

Sept. 28th, 1886.

ISAAC M. BRYAN,
D'f'd't's Att'y.

33 EXHIBIT "A."

ROCK HILL, S. C., 1886.

MY DEAR SIR: Yours of recent date to hand, and, as I take you to be a gentleman of a speculative disposition and one who would be willing to make a lot of money rapidly, provided it could be made safely, I make known to you the speculation as referred to in your letter. In case you do not engage in the business I trust you will not violate the trust imposed in you. If you enter into this exchange business you can make money faster than in any other business. You can make all the money you want in a short time with perfect safety. The goods I want you — exchange are very fine imitations of "Uncle Sam's greenbacks." I have them in No. 1, 2, 5, & 10's; also the 10 & 20 doll. silver bills. I guarantee you the goods are equal to the genuine, and there is absolutely no fear of detection. You can get them at $10 per $100, or $300 for $25,
34 and 1,000 doll. for $75. I will not sell or send out less than $100; price, 10 doll. If you want to make money very fast I advise you to raise all the money you can and send it at once and get a large lot of the goods while the opportunity lasts, as no one can tell how long that may be. Send money only in a plain envelope, marked if not received in 5 days return to you; in this way, if not delivered to me, it will be returned to you & will be entirely safe. Under no circumstances will I receive or sign for a registered letter or money order, as the authorities might get proof against me that way. Hoping to start a business that will prove mutually profitable, I am, yours in confidence,

J. J. SMITH.

Lock box 83, Rock Hill, S. C.

Address carefully and return all communications.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the District Court.

CLERK'S OFFICE.

35 I, Ephriam M. Seabrook, clerk of the said court, do hereby certify that the foregoing motion in arrest of judgment is a true copy of the original now on file and of record in my office.

Given under my hand and seal of said court this 11 day of Nov., 1886.

[SEAL.] (S'g'd) E. M. SEABROOK,
C. D. C. U. S., S. C.

Endorsements: U. S. of America, west. dist. of So. Ca. In the dist. court. The U. S. *vs.* William Henry. Indictment under sect. 5480. Motion in arrest of judgment on first indictment. Isaac M. Bryan, def'd't's att'y. Filed Sept. 28th, 1886. E. M. Seabrook, C. D. C. U. S., S. C.

36 THE U. S. OF AMERICA,
Dist. of So. Ca., Western District:

THE U. S. *vs.* WILLIAM HENRY, *alias* J. J. SMITH, &c.

The defendant was indicted under section 5480 of the Revised Statutes. He was found guilty under the 4th & 5th counts. He now moves in arrest of judgment. I have carefully considered the able and exhaustive argument of his counsel. This is the first of this character ever tried within this jurisdiction. The points made are novel in character. Were I more in doubt than I am I would not readily grant this motion, sitting as I do in a court whose errors against a defendant can be corrected in another tribunal.

The motion for arrest of judgment is refused.

Sept. 30th, 1886.

CHAS. H. SIMONTON,
Dist. Judge of U. S. for Dist. S. C.

37 UNITED STATES OF AMERICA,
District of South Carolina:

In the District Court.

CLERK'S OFFICE.

I, Ephriam M. Seabrook, clerk of said court, do hereby certify that the foregoing decree refusing motion for arrest of judgment is a true copy of the original now on file and of record in my office.

Given under my hand and seal of said court, at Charleston, S. C., this tenth day of November, A. D. 1886.

[SEAL.] E. M. SEABROOK,
C. D. C. U. S., S. C.

(Endorsements:) U. S. of America, dist. of So. Ca., west. district. The United States *vs.* William Henry, *alias* J. J. Smith &c. Order on motion in arrest of judgment. Filed Sept. 30th, 1886. E. M. Seabrook, C. D. C. U. S., S. C.

THE UNITED STATES OF AMERICA,
District of South Carolina:

In the Dist. Court, Western Dist. Aug. Term.

THE U. STATES *vs.* WM. HENRY.

1st indictment under sect. 5480 Rev. S. U. S.

First. The defendant excepts to the decision of the district judge refusing to arrest judgment in this case, and for error alleges—

As to the 4th count:

1. That the matters and things set forth in the 4th count of the said indictment do not constitute any offence against the 5480 sect. of the Revised Statutes of the U. S., under which the indictment was filed in this case, because there is no allegation in the said 4th count that the defendant incited the writing of the letter alleged therein to have been received by him.

2nd. That the only proof of any fraudulent scheme in this case consists of a circular letter, a copy of which is hereto an-
39 nexed, marked "A," found in the house of defendant, which said circular letter should have been set forth in the indictment *in hæc verba.*

Third. That there was no proof on the trial of said case other than said circular letter, marked "A," hereto annexed, that defendant offered counterfeit money for sale.

That his honor erred in not sustaining the motion on said grounds.

As to the 5th count:

1st. That the matters and things set forth in the 5th count of the said indictment do not constitute any offense against sect. 5480 of the Revised Statutes of the United States, under which the indictment was filed in this case.

2nd. That the only proof of any fraudulent scheme in this case consists of a circular letter, a copy of which is hereto annexed, marked "A," found in the house of defendant, which said cir-
40 cular should have been set forth "*in hæc verba*" in the indictment.

Third. That there was no proof that defendant offered counterfeit money for sale other than said circular.

And generally for other manifest defects in the record aforesaid appearing.

That his honor erred in not sustaining the motion in arrest of judgment on said grounds.

As to the sentence:

1st. That defendant excepts to the sentence because the same is unusual.

The defendant gave notice of appeal to the circuit court.

ISAAC M. BRYAN,
Defendant's Att'y.

Allowed this 30th day of September, A. D. 1886.
(Signed) CHARLES H. SIMONTON,
Dist. Judge of the U. S. for Dist. S. C.

41 Endorsements: U. S. A., dist. of S. C. The U. S. *vs.* Wm. Henry. Indictment under sect. 5480 R. S. U. S. No. 1. Bill of exceptions. Isaac M. Bryan, def'd't's att'y.

"A."

Rock Hill, S. C., 1886.

My Dear Sir: Yours of recent date to hand, and, as I take you to be a gentleman of a speculative disposition and one who would be willing to make a lot of money rapidly, provided it could be made safely, I make known to you the speculation as referred to in your letter. In case you do not engage in the business I trust you will not violate the trust imposed in you. If you enter this exchange business you can make money faster than in any other business. You can make all the money you want in a short time with
42 perfect safety. The goods I want you — exchange are very
fine imitation- of "Uncle Sam's greenbacks." I have them in No. 1, 2, 5, & 10's; also the 10 & 20 doll's silver bills. I guarantee the goods are equal to the genuine, and there is absolutely no fear of detection. You can get them at 10 doll. per $100, $300 for 25 doll., and 1,000 doll's for 75 doll. I will not sell or send out less than $100—price 10 doll. If you want to make money very fast I advise you to raise all the money you can and send it on at once and get a large stock of the goods while the opportunity lasts, as no one can tell how long that may be. Send money only in a plain envelope, marked if not received in 5 days return to you. In this way, if not delivered to me, it will be returned to you and will be entirely safe. Under no circumstances will I receive or sign for a registered letter or money order, as the authorities might get proof against me that way.

43 Hoping to start a business that will prove mutually profitable *that will prove mutually profitable,*

I am, yours in confidence, J. J. SMITH.

Lock box 83, Rock Hill.

Address carefully and return all communications.

[Endorsed:] "A."

United States of America, *District of South Carolina:*

In the United States Dist. Court.

Clerk's Office.

I, Ephriam M. Seabrook, clerk of said court, do hereby certify that the foregoing bill of exceptions is a true copy of the original now on file and of record in my office.

Given under my hand and seal of said court, at Charleston, So. Ca., this tenth day of November, A. D. 1886.

[SEAL.] (S'g'd) E. M. SEABROOK,
C. D. C. U. S., S. C.

44 *Petition for Writ of Error.*

In the Circuit Court U. S. for the Dist. of South Carolina, Fourth Circuit.

THE U. S. *vs.* WM. M. HENRY.

Ex Parte WM. M. HENRY.

Indictment No. 1 under section 5480 Rev. Stat. U. S.

To the Hon. Hugh L. Bond, U. S. circuit judge:

The humble petition of Wm. M. Henry respectfully shows to this court—

1. That at the August term of the dist. court of the United States for the west. dist. of South Carolina, A. D. 1886, he was tried, convicted, and sentenced to one year's imprisonment in the jail at Columbia, South Carolina, for an alleged violation of section (5480) five thousand four hundred and eighty of the Revised Statutes of the United States.

45 2. That he feels himself aggrieved by sundry decisions and rulings of said district court on the trial of said cause and in the judgment and sentence thereupon.

3. That exceptions were duly taken to said rulings and decisions of said district court, and a bill of exceptions duly tendered, allowed, and signed by the district judge, which is now a part of the record in said cause.

4. That the questions thus presented are important and difficult.

Wherefore this petitioner prays—

1. That his appeal be allowed and said error duly corrected.

2. That a writ of error do issue from this court commanding the said district court — United States, under its seal, distinctly and openly, to send the records and proceedings aforesaid, with all things concerning the same, to the circuit court — United States for the said district, together with this writ of error, so that the same may be at Columbia, in the said district, on the fourth Monday in November, A. D. 1886.

And your petitioner will ever pray.

46 (S'g'd) ISAAC M. BRYAN,
Att'y for Wm. M. Henry, Pet'r.

Oct. 18th, 1886.

(Endorsed:) On hearing read and filing the within petition, ordered that a writ of error do issue as prayed for in the within petition. (S'g'd) Hugh L. Bond, c't judge. In the circ't court U. S., dist. of South Carolina, fourth circuit. The. U. S. *vs.* Wm. M. Henry.

Ind. No. 1 under sec. 5480 Rev. Stat. U. S. *Ex parte* Wm. M. Henry. Pet. for writ of error to dist. c't & order thereon. Isaac M. Bryan, pet'r's att'y. Filed Oct. 20, 1886. J. E. Hagood, C. C. C. U. S., dist. S. C.

47 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of South Carolina, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said district court, before you, between the United States, plaintiff, and Wm. M. Henry, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the district of South Carolina, together with this writ, so
48 that you have the same at Columbia on the 4th Monday in November next, in the said circuit court to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein — correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, at Charleston, the 20th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

J. E. HAGOOD,
Clerk of the Circuit Court of the United States for the Dist. of South Carolina.

Endorsed: United States of America, district of South
49 Carolina, fourth circuit. The United States *vs.* William M. Henry, defendant. Writ of error. Filed 20 October, 1886. J. E. Hagood, C. C. C. U. S., dist. S. C.

I accept service of the within writ.
November 10, 1886.

E. M. SEABROOK,
C. D. C. U. S., S. C.

50 In the Circuit Court United States, Dist. of South Carolina' Fourth Circuit.

THE UNITED STATES *vs.* WM. M. HENRY.

First indictment under sec. 5480 Revised Stat. U. S.

This cause came on for hearing upon appeal from the dist. court. The only error which the court finds in the record is in the sentence being at hard labor, which sentence is reversed.

The sentence of this court is that the defendant, Wm. M. Henry, be imprisoned in the South Carolina penitentiary, at Columbia, until the first day of October, A. D. 1887.

April 9th, 1887.

(S'g'd) HUGH L. BOND, *C't Judge.*

Endorsed: United States of America, dist. of South Carolina, fourth circuit. In circuit court. The United States *vs.* Wm. M. Henry. Appeal from dist. court. Order reversing sentence of dist. court. Filed Ap'l 9, 1887. J. E. Hagood, C. C. C. U. S., dist. S. C.

51 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In Circuit Court.

I, J. E. Hagood, clerk of the said court, do hereby certify that the foregoing thirty-nine (39) pages *is* a true copy of the original record now on file in my office in this cause.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, S. C., this June 1st, 1887.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

52 Endorsed: United States of America, dist. of South Carolina, fourth circuit. In the circuit court. The United States *vs.* Wm. Henry. Transcript of record. Exhibit "A."

53 EXHIBIT B.

54 UNITED STATES OF AMERICA,
District of South Carolina:

In the United States District Court.

THE UNITED STATES *vs.* W. M. HENRY, *alias*, &c.

CLERK'S OFFICE.

I, Ephriam M. Seabrook, clerk of said court, do hereby certify that the within indictment, with the endorsements thereon, is a true copy of the original now on file and of record in my office.

Given under my hand and seal of said court this tenth day of November, A. D. 1886, at Charleston, S. C.

[SEAL.] E. M. SEABROOK,
C. D. C. U. S., S. C.

55 THE UNITED STATES OF AMERICA,
Western District of South Carolina:

In the Dist. Court.

At a stated term of the district court of the United States for the western district of South Carolina, begun and holden at Greenville, within and for the dist. aforesaid, on the first Monday of August, in year of our Lord one thousand eight hundred and eighty-six, the jurors of the United States of America within and for the district aforesaid—that is to say, upon their oaths present that heretofore, to wit, on the twelfth day of March, in the year of our Lord one thousand eight hundred and eighty-six, at Rock Hill, in the county of York, in the State of South Carolina, in the western district of South Carolina, and within the jurisdiction of this court, William H. Martin, otherwise called Willian Henry, otherwise called J. J. Smith, otherwise called John Andrew, having devised a scheme and artifice
to defraud divers persons to the jurors unknown by selling
56 to divers persons to the jurors unknown divers counterfeited
United States Treasury notes, which said scheme and artifice were to be effected by opening correspondence and communications with other persons to the jurors unknown by means of the post-office establishment of the United States, did in and for executing such scheme and artifice wilfully and unlawfully take and receive from the post office at Rock Hill aforesaid, the said post office being a post office of the United States, a letter directed to J. J. Smith, lock box 83, Rock Hill, S. C., which said letter is in the words and figures following:

MAIDEN, M. T., *Mar.* 10, 1886.

Mr. J. J. Smith.

SIR: Yours of recent date at hand. After consideration I concluded to try you. If you are a snide, all right; if not and your stuff is worth anything, we both can make some money. This is the best country I ever struck for that kind of work, especially where there is a lively camp. Enclosed you will find $10. Send me a few ones & a couple of tens, greenbacks; a couple of tens, silver notes, and the rest in fives.

57 Hoping you mean fair play, I remain
Yours in confidence, ED. KNIPE,
Maiden, Montana.

Contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further present that William H. Martin, otherwise called William Henry, otherwise called J. J. Smith, otherwise called Jno. Andrew, having devised a scheme to defraud divers persons to the jurors unknown by selling to divers persons to the jurors unknown divers counterfeit United States Treasury notes, which said scheme was to be effected by inciting other persons to the jurors unknown to open communi-

cation with the said William H. by means of an advertisement inserted in a newspaper called "Texas Siftings," published at New York, in the State of New York, and at Austin, in the State of
Texas, which said advertisement is in the words and figures
58 following: "Greenback. $10 invested returns $100 in 10 to
20 days. Address box 83, Rock Hill, S. C."—did, on the
twenty-fifth day of March, in the year of our Lord one thousand eight hundred and eighty-six, at Rock Hill, in the county of York, in the State of South Carolina, in the western district of South Carolina and within the jurisdiction of this court, in and for executing such scheme, unlawfully take and receive from the post office at Rock Hill aforesaid, the said post office being a post office of the United States, a letter directed to "Box No. 83, Rock Hill, S. C.," which said letter is in the words and figures following:

CHARLESTON, S. C., *Mar. 23d*, '86.

Box 83, Rock Hill, S. C.:

I see your advertisement in Texas Siftings. What must I do to make the money you write about? Am anxious to make money some way. What will it cost me at the start? Answer at once.

Yours, J. H. KIRBY.

59 *In Care of Pavilion Hotel, Charleston, S. C.*

Contrary to the act of Congress in such case made and provided and against the peace and dignity of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said William H., having devised a scheme to defraud divers persons to the jurors unknown by selling to divers persons to the jurors unknown divers counterfeited United States Treasury notes, which said scheme was to be effected by inciting other persons, to the jurors unknown, to open communication with the said William H. by means of an advertisement inserted in a newspaper called "Texas Siftings," published at New York, in the State of New York, and at Austin, in the State of Texas, which said advertisement is in the words & figures following: "Greenback. $10 invested returns $100 in 10 to 20 days. Address box 83, Rock Hill,
S. C. And by means of an advertisement inserted in a news-
60 paper called "The National Police Gazette," published in the
city of New York, in the State of New York, which said last-mentioned advertisement is in the words and figures following: "Greenback. $10 invested returns $100 in 10 to 20 days. For proof of this, address, with stamp, J. J. Smith, box 83, Rock Hill, S. C."—did on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and eighty-six, at Rock Hill aforesaid, he, the said William H., then and there attempting to execute said scheme, unlawfully take and receive from the post office at Rock Hill, S. C., aforesaid, the said post office being a post office of the United States, a letter directed to "Box 83, Rock Hill, S. C.", which said letter is in the words and figures following: "Greenback. $10 invested returns $100 in 10 to 20 days. Address box 83, Rock

Hill, S. C." (the aforesaid words and figures being a printed slip pasted at the top of the latter, and underneath which the letter continues in the words & figures following):

You will please send particulars of above.

61 Yours truly, R. L. WELBORN.

Claburne, Texas.

Contrary to the act of Congress in such case made & provided and against the peace & dignity of the United States.

LEROY F. YOUMANS,
U. S. Att'y.

62 Endorsed: U. S. of America, west. dist. of So. Ca. District court. The United States *vs.* William H. Martin, *alias* Wm. Henry, *alias* J. J. Smith, *alias* John Andrew. Indictment for violation section 5480, misusing the post-office establishment of the United States. Leroy F. Youmans, U. S. att'y. Filed 20 Sept., 1886. E. M. Seabrook, C. D. C. U. S., S. C.

True bill.

H. E. GRAY, *Foreman.*

Guilty on 1st count; not guilty on 2nd & 3rd counts.
Sept. 23rd, '86.

WM. GOLDSMITH, *Foreman.*

Sentence.

The sentence of the court is that the defendant, Wm. M. Henry, *alias* William H. Martin, *alias* J. J. Smith, *alias* John Andrew, upon the termination of his first sentence, be imprisoned at hard labor in the Albany penitentiary, State of N. Y., for the term of fifteen months.

30 Sept., 1886.

CHARLES H. SIMONTON,
Dist. Judge of the U. S. for S. C.

63 UNITED STATES OF AMERICA,
District of South Carolina:

West: District. Aug. Term.

THE UNITED STATES *vs.* WM. M. HENRY.

Indictment 2nd under sect. 5480 Rev. Stat. U. S.

And now comes the defendant, Wm. M. Henry, and pleads to the said indictment, and by way of "plea in bar" to the said indictment submits to the court and says that he ought not to be tried for any offense stated in the said indictment upon the following grounds:

1. Because he has been tried and convicted upon an indictment at the present term of this court under section 5480 R. S. U. S., alleging three offences as having been committed by this defendant within the first six calendar months of the year 1886.

2nd. Because the present indictment, upon which he is now arraigned for trial, is also under the same section as that upon which
he, the defendant, has been convicted, to wit, section 5480
64 Rev. Stat. U. S., and alleges the three (3) offences charged
therein to have been committed by this defendant within the first six calendar months of the year 1886, the same period within which the three (3) offences set forth in the indictment upon which he has been convicted are alleged to have been committed.

3rd. Because by the provisions of section 5480 of the Revised Statutes of the U. S. there cannot be another indictment preferred against him, the defendant, within the jurisdiction of this court for any offense committed by him against said section 5480 of the Revised Statutes U. S. for the period included within the first six (6) calendar months of the year 1886.

Wherefore this defendant prays that his "plea in bar" herein set forth be sustained and this 2nd indictment under sect. 5480 of the Revised Statutes U. S. be quashed.

Sept. 22nd, 1886.

ISAAC M. BRYAN,
Def'd't's Att'y.

65 UNITED STATES OF AMERICA,
District of South Carolina:

In the Dist. Court.

CLERK'S OFFICE.

I, Ephriam M. Seabrook, clerk of said court, do hereby certify that the foregoing plea in bar is a true copy of the original on file & of record in my office.

Given under my hand and seal of said court this 11th day of Nov., A. D. 1886.

E. M. SEABROOK,
C. D. C. U. S., S. C.

Endorsed: U. S. of America, dist. of So. Ca. In the dist. court. The U. S. *vs.* Wm. M. Henry. 2nd indictment under section 5480 Rev. Stat. U. S. Plea in bar. Isaac M. Bryan, def't's att'y. Filed 22 Sept., 1880. E. M. Seabrook, C. D. C. U. S., S. C.

66 THE UNITED STATES OF AMERICA,
Western Dist. of So. Ca.:

In the Dist. Court.

THE UNITED STATES
vs.
WM. H. MARTIN, *alias* WILLIAM HENRY, *alias* J. J. SMITH, *alias* JOHN ANDREW.

And the United States attorney comes before this honorable court and says that the matters and things alleged in the plea of the defendant are not sufficient in law to prevent his trial herein.

LEROY F. YOUMANS,
U. S. Att'y.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the District Court.

CLERK'S OFFICE.

I, Ephriam M. Seabrook, clerk of said court, do hereby certify that the above demurrer and decision sustaining the demurrer and overruling plea is a true copy of the originals on file and of record in my office.

67 Given under my hand and seal of said court, at Charleston, S. C., this tenth day of Nov., A. D. 1886.

[SEAL.] E. M. SEABROOK,
C. D. C. U. S., S. C.

(Endorsed:) U. S. of America, west. dist. of So. Ca. In the dist. court. The U. S. *vs.* William H. Martin, *alias* William Henry, *alias*, &c. Demurrer sustained. Plea overruled. (Signed) Charles H. Simonton, U. S. judge. 23 Sept., 1886. Filed 23 Sept., 1886. E. M. Seabrook, C. D. C. U. S., S. C.

68 THE UNITED STATES OF AMERICA,
District of South Carolina, Western District:

THE UNITED STATES

vs.

WILLIAM H. MARTIN, *alias* WILLIAM HENRY, *alias* J. J. SMITH, &c.

The defendant, under the name of William Henry, *alias* J. J. Smith, had been indicted under section 5480 of the Revised Statutes — making use of the mails for the purpose of carrying out a fraudulent device.

Three several charges were made in the indictment in said counts. He was convicted on the 4th & 5th counts, and his counsel entered a motion in arrest of judgment.

Before verdict in that case the defendant was presented by the grand jury for violating the same section of the Revised Statutes, the indictment containing three several charges, wholly distinct from the charges in the first indictment, occurring, however, within
69 the same six months. To this the defendant pleaded his conviction under the first indictment, and the district attorney demurred to the plea.

The question is, Can but one indictment, charging three distinct acts, occurring within the same six months, be maintained for violating the provisions of the section if such indictment results in conviction?

In order to sustain a plea of *autrefois* acquit or *autrefois* convict it must appear that the former proceedings have been concluded.

In the present case the motion in arrest of judgment is pending "*non constat,*" that the defendant will ever be convicted. Apart from this, I am of the opinion that it was not the intention of this section to confine the right to convict for the transactions of six calen-

dar months to three several acts only. Were this the case a man, as the dist. att'y has said, may be guilty of one thousand acts violating the provisions of this section and the section itself,
70 under this construction, would compel the Government to condone 997 of them. Persons who use the mail for these fraudulent purposes necessarily remain but a short time in any particular place. When his nefarious purposes are detected and he is arrested can it be supposed that the officers of the Government must examine all the proofs against him, select three instances, prosecute on them, and if perchance the prosecution fail that he should go unwhipped of justice?

Besides this, the act forbids not the general use of the post office for the purposes of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet or the taking out of a letter or packet from the post office in the furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act. The peculiar phraseology
71 of this section as compared with section 1024, in my opinion, sustains this view. Under section 1024 when three or two or more acts of the same class of crimes or offences, these must be found in the same indictment, and if several indictments are in existence they must all be consolidated, however numerous the acts may be; but under this section "the indictment may severally charge offences to the number of three," and no more. When one is charged with a number of offenses against a section of the Revised Statutes they must be consolidated; of the offences against this section only three can be put in one indictment. The demurrer is sustained and the plea overruled. Let the defendant plead over.

23rd Sept., 1886.

CHAS. H. SIMONTON.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the District Court.

CLERK'S OFFICE.

72 I, Ephriam M. Seabrook, clerk of said court, do hereby certify that the foregoing decree sustaining demurrer to plea is a true copy of the original on file and of record in my office.

Given under my hand and seal of said court, at Charleston, S. C., this tenth day of November, A. D. 1886.

[SEAL.] E. M. SEABROOK,
C. D. C. U. S., S. C.

Endorsed: U. S. of America, dist. of So. Ca., west. district. The United States *vs.* William H. Martin, *alias* J. J. Smith. Opinion sustaining demurrer to plea. Filed 23d Sept., '86. E. M. Seabrook, C. D. C. U. S., S. C.

73 *Motion in Arrest of Judgment.*

THE UNITED STATES OF AMERICA, *District of South Carolina:*

In the West. Dist. Aug. Term.

THE U. S. *vs.* WM. HENRY.

Ind. under sect. 5480 R. S. U. S. 2nd indictment.

And now, after verdict and before sentence, comes the said defendant, William Henry, and prays that judgment herein be arrested, and for cause says:

First. That the matters and things set forth in the 1st count of the said indictment do not constitute any offense against section 5480 of the Revised Statutes of the U. S., under which the indictment was filed in this case, because there is no allegation that defendant incited the writing of the letter alleged therein to have been received by him.

Second. That the only proof of any fraudulent scheme in this case consists of a circular letter, a copy of which is hereto annexed,
74 marked "A," found in the house of defendant, which said circular letter should have been set forth in the said indictment "*in hæc verba.*"

Third. That there was no proof in the trial of said case other than said circular letter, marked "A," hereto annexed, that defendant offered counterfeit money for sale.

Fourth. And for other manifest defects in the record aforesaid appearing.

Sept. 28th, 1886.

ISAAC M. BRYAN,
Def'd't's Att'y.

EXHIBIT "A."

ROCK HILL, S. C., 1886.

MY DEAR SIR: Yours of recent date to hand, and, as I take you to be a gentleman of a speculative disposition and one who would be willing to make a lot of money rapidly, provided it could be made safely, I make known to you the speculation as referred to in your letter. In case you do not engage in the business I trust you will not violate the trust imposed in you. If you enter into this
75 exchange business, you can make money faster than in any other business. You can make all the money you want in a short time with perfect safety. The goods I want you — exchange are very fine imitations of "Uncle Sam's greenbacks." I have them in No. 1, 2, 5, & 10's; also the 10 & 20 doll. silver bills. I guarantee you the goods are equal to the genuine, and there is absolutely no fear of detection. You can get them at 10 doll. per $100, or $300 for 25 doll., and 1,000 doll. for $75. I will not sell or send out less than $100—price $10. If you want to make money very fast I advise you to raise all the money you can and send it on at once

and get a large stock of the goods while the opportunity lasts, as no one can tell how long that may be. Send money only in a plain envelope, marked if not received in 5 days return to you. In this way, if not delivered to me, it will be returned to you and will be entirely safe. Under no circumstances will I receive or sign 76 for a registered letter or money order, as the authorities might get proof against me that way. Hoping to start a business that will prove mutually profitable,

I am, y'rs in confidence, J. J. SMITH.

Lock box 83, Rock Hill, S. C.

Address carefully & return all communications.

Endorsed: U. S. of America, west. dist. of So. Ga. In the dist. court. The U. S. *vs.* William Henry. Indictment under sect. 5480. Motion in arrest of judgment on second indictment. Isaac M. Bryan, def'd't's att'ys. Filed 28 Sept., 1886. E. M. Seabrook, C. D. C. U. S., S. C.

77 THE UNITED STATES OF AMERICA,
District of So. Ca., Western District:

THE UNITED STATES

vs.

WILLIAM H. MARTIN, *alias* J. J. SMITH, &c.

The defendant was indicted under section 5480 of the Revised Statutes. The indictment contained three counts. He was found guilty on the first count and now enters his motion in arrest of judgment. The question is, Does this court state with sufficient certainty the offense with which the defendant was charged so as to sustain the verdict of the jury?

In order to sustain a count under the section in question it must be alleged and proved that the defendant devised or intended to devise a scheme or artifice to defraud; that it was to be *a*ffected by either opening or intending to open correspondence with some 78 other persons by means of the post-office establishment, or it may be alleged that it was to be *a*ffected by inciting such other persons to open communication with him; that he executed such scheme or attempted so to do by placing a letter or packet in any post office of the United States or by taking or receiving therefrom any such letter or packet. The gist of the offence is that there was a correspondence opened or intended to be opened, by means of the post office, with some other person, or that such other person was incited to open correspondence by the defendant with him. Either one or the other of these made an offense under the act, the other requirements being present.

The count in question charges the scheme and artifice and sets forth its fraudulent character; that it was to be effected by opening correspondence and communication with other persons by means of the post-office establishment, and the special offense charged 79 is that he did unlawfully take and receive from the post office at Rock Hill, a post office of the United States, a letter indicted to one of the names under which he stands charged—J. J. Smith, lock box 83—and sets out the letter in full, the letter commencing "Yours of recent date at hand," and then going on and stating his conclusion to try the person to whom the letter is addressed, and making offers requiring a reply. It must be noted that the defendant does not plead in abatement of the indictment.

Does this count state with certainty the offense charged? It sets out the offense "opening a correspondence" in the words of the statute.

Does the letter set forth in the count militate with the charge? The letter opens "Yours of a recent date received," showing that it was the continuation of a correspondence opened. We have nothing to do with the facts in considering this motion, but if the 80 facts be proved as stated they justify the verdict.

It is not necessary in order to show that a correspondence has been opened to produce or set out the first letter in the correspondence. It is enough if it can be shown in any one of the letters in the chain of correspondence that it is a part of a correspondence already opened.

The answer to a letter is as conclusive proof of this as the letter itself to which it replies if such answer refers to the letter.

The motion for arrest of judgment is refused.

30th Sept., 1886.

CHARLES H. SIMONTON,
Dist. Judge U. S., Dist. of S. C.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the District Court.

CLERK'S OFFICE.

I, Ephriam M. Seabrook, clerk of said court, do hereby 81 certify that the foregoing decree refusing motion for arrest of judgment is a true copy of the original on file and of record in my office.

Given under my hand and seal of said court, at Charleston, S. C., this 10th day of Nov., A. D. 1886.

[SEAL.]

E. M. SEABROOK,
C. D. C. U. S., S. C.

Endorsed: U. S. of America, dist. of So. Ca., western dist. The United States *vs.* William H. Martin, *alias* J. J. Smith, &c. Order on motion in arrest of judgment. Filed 30 Sept., 1886. E. M. Seabrook, C. D. C. U. S., S. C.

82 *Bill of Exceptions.*

THE UNITED STATES OF AMERICA, *District of South Carolina:*

In the District Court, West. Dist. August Term.

THE U. STATES *vs.* WM. HENRY.

Second indictment under sect. 5480. R. S. of U. S.

The defendant excepts to the decision of the dist. judge, refusing to arrest the judgment in this case, and for cause alleges—

1. That the court erred in refusing to sustain the "plea in bar," to this indictment on the grounds set forth in said plea.

2d. That the matters and things set forth in the first count of the said indictment do not constitute any offense against sect. 5480 of the Revised Statutes, U. S., under which the indictment was filed, because there is no allegation that defendant incited the writing of the letter alleged thereon to have been received by him.

83 3rd. That the only proof of any fraudulent scheme in this case consists of a circular letter, a copy of which is hereto annexed, marked "A," found in the house of defendant, which said circular letter should have been set forth in said court "*in hæc verba.*"

4th. That there was no proof in the trial of said cause other than said circular letter, marked "A" hereto annexed, that defendant offered counterfeit money for sale.

4. And for other manifest defects in the record aforesaid appearing.

That his honor erred in not sustaining the motion in arrest of judgment on said grounds.

As to the sentence:

The defendant excepts to the sentence because the same is unusual.

The defendant gave due notice of appeal to circuit court.

ISAAC M. BRYAN,
Def'd't's Att'y.

84 Allowed this 30th day of September, A. D. 1886.

CHARLES H. SIMONTON,
Dist. Judge of the U. S. for Dist. of S. C.

"A."

ROCK HILL, S. C., 1886.

MY DEAR SIR: Yours of recent date to hand, and, as I take you to be a gentleman of a speculative disposition and one who would be willing to make a lot of money rapidly, provided it could be made safely, I make known to you the speculation as referred to in your letter. In case you do not engage in the business, I trust you will not violate the trust imposed in you. If you enter into this exchange business you can make more money faster than in any other

business. You can make all the money you want in a short
85 time with perfect safety. The goods I want you to ex- are
very fine imitations of "Uncle Sam's greenbacks." I have
them in No-. 1, 2, 5, & 10's; also the 10 & 20 doll. silver bills.

I guarantee you the goods are equal to the genuine, and there is absolutely no fear of detection. You can get them at $10 doll's per $100, or $300 for $25 *doll's*, and 1,000 dolls for $75. I will not sell or send out less than $100—price, 10 dolls. If you want to make money very fast I advise you to raise all the money you can and send it on at once and get a large stock of the goods while the opportunity lasts, as no one can tell how long that may be. Send money only in plain envelope, marked if not received in 5 days return to you. In this way, if not delivered to me, it will be re-
turned to you, and will be entirely safe. Under no circum-
86 stances will I receive or sign for a registered letter or money
order, as the authorities might get proof against him that
way. Hoping to start a business that will prove mutually profitable,
I am yours, in confidence,

J. F. SMITH.

Address carefully and return all communications.
Lock box 83, Rock Hill.

UNITED STATES OF AMERICA, *Dist. of So. Ca.:*

In the Dist. Court.

CLERK'S OFFICE.

I, Ephraim M. Seabrook, clerk of said court, do hereby certify that the foregoing bill of exceptions is a true copy of the original on file in my office.

Given under my hand and seal of said court this 10th day of November, A. D. 1886.

[SEAL.] E. M. SEABROOK,
C. D. C. U. S., D. C.

87 Endorsed: U. S. A., dist. of So. Ca. The U. S. *vs.* Wm. Henry. Ind. No. II. Sect. 5480. Bill of exceptions. Isaac M. Bryan, def'dt's att'y.

88 *Petition for Writ of Error.*

In the Circuit Court U. S. for the District of South Carolina, Fourth Circuit.

THE U. S. *vs.* WM. M. HENRY.

Indictment No. II, under sect. 5480, Revised Stat. U. S.

Ex parte WM. M. HENRY.

To the Hon. Hugh L. Bond, U. S. circuit judge:

The humble petition of Wm. M. Henry respectfully shows to this court:

1. That at the August term of the district court of the United States for the western district of South Carolina, A. D. 1886, he was

tried, convicted, and sentenced to one year and three months' imprisonment in the jail at Albany, State of New York, for an alleged violation of section (5480) five thousand four hundred and eighty of the Revised Statutes United States.

89 2. That he feels himself aggrieved by sundry decisions and rulings of said district court on the trial of said cause and in the judgment and sentence thereupon.

3. That exceptions were duly taken to said rulings and decisions of said district court and a bill of exceptions, duly tendered, allowed and signed by the district judge, which is now a part of the record in said cause.

4. That the questions thus presented are important and difficult.

Wherefore this petitioner prays—

I. That his appeal be allowed and said errors duly corrected.

II. That a writ of error do issue from this court commanding said district court of — United States, under its seal, distinctly and openly to send the records and proceedings aforesaid, with all things concerning the same, to the circuit court United States for the said district, together with this writ of error, so that the same may
90 be at Columbia, in the said district, on the fourth Monday in
November, A. D. 1886.

And your petitioner will ever pray.

Oct. 18th, 1886.

ISAAC M. BRYAN,
Att'y for Wm. M. Henry, Pet.

Endorsed: On hearing read and filing the within pet., ordered that the writ of error do issue, as prayed for in the within petition. Hugh L. Bond, c't judge. In the circ't court U. S., dist. of So. Ca., fourth circuit. Ind. No. 2 under sect. 5480, Rev. Stat. U. S. The U. S. *vs.* Wm. M. Henry. *Ex parte* Wm. M. Henry. Pet. for writ of error to dist. c't and order thereon. Isaac M. Bryan, pet's att'y. Filed Oct. 20, 1886. J. E. Hagood, C. C. C. U. S., Dist. S. C.

91 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of South Carolina:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, between United States, plaintiff, and Wm. M. Henry, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command ou, if judgment be therein given, that then, under your seal, nd openly, you send the record and proceedings aforesaid, with ll things concerning the same, to the circuit court of the United States for the district of South Carolina, together with this
92 writ, so that you have the same at Columbia on the fourth
Monday of November next, in the said circuit court, to be

then and there held, that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the the United States, at Charleston, the 20th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

[SEAL.] J. E. HAGOOD,
Clerk of the Circuit Court of the United States
for the District of South Carolina.

93 Endorsed: United States of America, district of South Carolina, fourth circuit. The United States *vs.* Wm. M. Henry, defendant. Writ of error. Filed 20 Oct., 1886. J. E. Hagood, C. C. C. U. S., Dist. D. C.

I accept the service of the within writ.
November 10, 1886.

E. M. SEABROOK,
C. D. C. U. S., S. C.

In the Circuit Court U. S., District of South Carolina, Fourth Circuit.

THE UNITED STATES *vs.* WM. M. HENRY.

Second Ind. under sect. 5480 R. S. U. S.

This cause came on for hearing upon appeal from the dist. court. The only error which the court finds in the record is in the sentence being at hard labor, which sentence is reversed.

94 The sentence of this court is that the defendant, Wm. M. Henry, upon the termination of his first sentence, be imprisoned in the Albany penitentiary, State of New York, for the term of fifteen months.

HUGH L. BOND, *C't Judge.*

April 9, 1887.

Endorsed: United States of America, district of South Carolina, fourth circuit. In circuit court. The United States *vs.* Wm. M. Henry. Appeal from dist. c't. Order reversing sentence of district court. Filed Ap'l 9, 1887. J. E. Hagood, C. C. C. U. S. Dist., S. C.

95 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In circuit court.

I, J. E. Hagood, clerk of the said court, do hereby certify that th
foregoing forty-one pages (41) is a true copy of the original recor
now on file in my office in this case.

Given under my hand and seal of said court at clerk's office in the city of Charleston, S. C., this June 1st, 1887.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U.S. Dist. of S. C.

Endorsed on cover: The United States of America. Dist. of South Carolina. Fourth circuit, in the circuit court. The United States *vs.* Wm. Henry. Transcript of record. Exhibit "B."